



AUGUST 9, 1996

COMDTNOTE 16000

COMMANDANT NOTICE 16000

CANCELLED AUG 8 '96

Subj: CH-1 TO COMDTINST M16000.10 (SERIES), MARINE SAFETY MANUAL,  
VOLUME V, INVESTIGATIONS

1. PURPOSE. This Notice advises personnel assigned to Investigation duties of the latest policies and procedures for program activities.
2. ACTION. Area and district commanders, commanders of maintenance and logistics commands, commanders of Headquarters units, shall ensure compliance with the provisions of this Notice.
3. SUMMARY OF CHANGES. This change is a complete replacement of Chapter 2. Substantive changes have been marked with a vertical line; editorial changes are not marked.
4. PROCEDURES. Remove and insert the following pages:

Remove

CONTENTS I  
2-i through 2-68

Insert

CONTENTS I CH-1  
2-i through 2-65, CH-1

DISTRIBUTION - SDL No.134

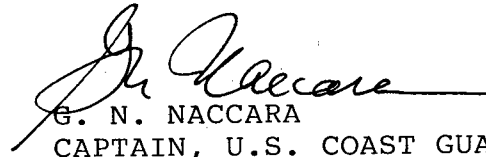
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NON-STANDARD DISTRIBUTION: (See page 3.)

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5. DOCUMENTATION. Date and sign the Record of Changes. File this notice with the manual as a record of changes.



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CAPTAIN, U.S. COAST GUARD  
ACTING CHIEF, MARINE SAFETY AND  
ENVIRONMENTAL PROTECTION

Encl: (1) CH-1 to COMDTINST M16000.10

## Non-Standard Distribution:

B:c CCGD8 (14); CCGD7 (11); CCGD13 (9); CCGD9 (8); CCGD1, 5 (7); CCGD17 (6); CCGD2, CCGD11 (5); CCGD14 (4); MLCLANT, MLCPAC (FAC)(1).

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C:m New York (10); Sturgeon Bay (3).

D:b National Strike Force Coordination Center (1) (only).

D:d New York (6) (extra).

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D:l CG Liaison Officer U.S. Army Corps of Engineers, CG Liaison Officer MILSEALIFTCOMD (Code N-7CG), CG Liaison Officer RSPA (DHM-22), CG Liaison Officer MARAD (MAR-742), CG Advisor Panama Canal Commission, CG Liaison Officer American Samoa, CG Advisor NWC, CG Liaison Officer JUSMAGPHIL, CG Liaison Officer (IMO) London, CG Consultant (IMO/SAID) Caribbean, CG Attache US DAO Bogota, CG Liaison World Maritime University, CG Liaison Officer ABS, Maritime Liaison Office Commander U.S. Naval Forces Central Command (1).

E:o New York (15); Grand Haven (4); Long Island Sound (2); Sault Ste. Marie (2).

F:j Except Tampa.

ABS (1).

DOJ Torts Branch (Washington, DC; New York; San Francisco only) (1).

MARAD (MRG 4700) (1).

MSC (M-24) (1).

NOAA Fleet Inspection Officer (1).

NTSB (Marine Accident Division) (2).

World Maritime University (2).

U.S. Merchant Marine Academy, Kings Point, NY (1).



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## MARINE SAFETY MANUAL

### CHAPTER 2. PERSONNEL INVESTIGATIONS - PROCEDURES AGAINST LICENSES AND DOCUMENTS

A. General. Violations by personnel of statutes and regulations enforced by the Coast Guard can result in criminal or civil penalties taken against the person and/or administrative proceedings (or alternative action) against merchant mariners' credentials (MMCs) issued to the person by the Coast Guard. Enforcement tools available to the Officer in Charge, Marine Inspection (OCMI) are discussed in Volume I, Commandant Instruction (COMDTINST) M16000.6 (Chapter 4). Procedures for processing civil penalty violations and evidence of criminal violations are contained in Chapter 5 of COMDTINST M16000.6. This chapter provides policy guidance concerning action against MMCs. The basic authority to initiate suspension and revocation (S&R) proceedings is derived from 46 U.S.C. Chapter 77. This authorizes action against a mariner who while acting under the authority of his or her MMCs commit acts of incompetence, misconduct, negligence, or violations of laws or regulations which are intended to promote marine safety or to protect navigable waters. 46 U.S.C. 7704 also allows for S&R proceedings against mariners who have convictions for a dangerous drug law violation, or have been shown to be a user of, or addicted to the use of dangerous drugs whether acting under the authority of their MMCs or not. Personnel investigations are conducted to promote safety on the high seas and the navigable waters of the United States, and to prevent or mitigate personnel related hazards to life, property, and the marine environment. Alternative actions concerning MMCs include voluntary surrender agreements, voluntary deposit agreements, good-faith deposits, settlement agreements, and letters of warning.

#### 1. Definitions.

- a. Merchant Mariners' Credentials (MMCs). Any license, Certificate of Registry (COR), or Merchant Mariner Document (MMD) issued by the Coast Guard authorizing service on vessels, as required by various statutes and regulations.
- b. Mariner. Any person who has been issued MMCs by the Coast Guard.
- c. Suspension And Revocation (S&R) Proceedings. Proceedings against MMCs under the authority of 46 U.S.C. Chapter 77.

2. Disciplinary Concerns. It is not the intent of the Coast Guard to use S&R proceedings to maintain discipline on merchant vessels. Only if a disciplinary problem constitutes a hazard to life, property, or the environment will S&R proceedings be contemplated.

3. Jurisdiction. Jurisdiction to initiate S&R action against MMCs must be established in one of two ways. The first is through the existence of evidence that a mariner, while acting under the authority of his or her MMCs, has committed an act of incompetence, misconduct, or negligence; or has violated or failed to comply with a provision of, or regulation issued under, Subtitle II of Title 46 U.S.C.; or has violated or failed to comply with any law or regulation intended to promote marine safety or to protect navigable waters. The second is through the existence of evidence that a mariner has either been convicted of violating a dangerous drug law of the United States or of any State within the past 10 years; or has ever been a user of, or addicted to, a dangerous drug.

3. a. Acting Under Authority Of MMCs. As defined in 46 CFR 5.57(a), a person employed in the service of a vessel is considered to be acting under the authority of his or her MMCs when the holding of MMCs is

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- A.3. a. (cont'd) either required by law or regulation, or is required by an employer as a condition of employment. See subparagraph 2.D.7.b. below for special circumstances in cases involving pilots. A mariner continues to act under the authority of his or her MMCs during periods of time away from the ship while in the service of the vessel. A mariner also acts under authority of his or her MMCs when engaged in official matters related to those credentials, including such acts as applying for renewal of his or her MMCs, taking examinations for upgrading or endorsements, requesting duplicate or replacement credentials, appearing at a suspension and revocation hearing, etc. The Coast Guard maintains jurisdiction over a mariner with expired MMCs because our S&R proceedings are taken against the mariner's entitlement to those MMCs. The act of applying for original MMCs is therefore not an action performed under the authority, since the application precedes the issuance of the credential. See Appeal Decisions 2025, 2062, and 2131.
- b. Violation Of Narcotic Drug Law/Use Or Addiction To Dangerous Drug. There is no requirement to show that a seaman was acting under the authority of his or her MMCs to prove charges of violation of narcotic drug law or use/addiction to dangerous drugs. The Investigating Officer (IO) need only prove that one of the offenses under 46 U.S.C. 7704(b) and/or (c) occurred, that the seaman was duly issued credentials at the time of such an offense, and the offense occurred within the last 10 years.
4. Public Vessels. A "public vessel" is defined in 46 U.S.C. 2101(24) as a vessel that is owned, or demise chartered, and operated by the United States Government or a government of a foreign country; and is not engaged in commercial service. A public vessel of the United States is not subject to Coast Guard inspection, and is exempt from certain other navigation and vessel inspection requirements (except vessels owned, operated, or controlled by the Department of Transportation (DOT), as per 46 U.S.C. 2109. However, a mariner hired to serve on a public vessel on the condition that he or she holds MMCs is subject to S&R proceedings. The Commandant has signed an Inspection and Certification Agreement with the Commander, Military Sealift Command (MSC), and the U.S. Army Corps of Engineers (COE) concerning disciplinary actions against merchant mariners serving on board MSC and COE vessels. The Coast Guard has authority to conduct S&R proceedings against a civil service or contract crewmember when possession of MMCs was a condition of employment.
5. Fraudulent Applications. Any MMCs issued upon submission of false information are void. See Appeal Decision 2025. When a fraudulent application results in the issuance of original MMCs, the credential is considered void and may be recovered without the process of an Administrative Hearing. Under 18 U.S.C. 1001 intentionally false or fraudulent statements or representations made in any matter within the jurisdiction of any department or agency of the United States are punishable by a \$10,000 fine or 5 years' imprisonment, or both. Such cases can be forwarded to the district commander with a recommendation for referral to the local U.S. attorney.
6. Intoxication. 33 CFR 95.055 provides penalties for individuals who are intoxicated while operating a vessel. 46 CFR 4.05-12 further requires that marine casualty reports include information on whether or not the

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- 2.A.6. (cont'd) use of alcohol contributed to a casualty. Additionally, 46 CFR 16.240 requires drug and alcohol tests be conducted on individuals involved in serious marine incidents.
- a. Intoxication Standards. 33 CFR 95, sets intoxication standards based on blood alcohol concentration (BAC) levels and/or observed behavior; defines what constitutes reasonable cause for chemical testing of individuals, and establishes certain operating rules for commercial marine personnel serving aboard inspected vessels.
  - b. Detection of Intoxication Incidents. The marine employer is responsible for the detection and reduction of incidents involving intoxicated operators aboard commercial vessels. OCMI's, and Captain of the Ports (COTP) should review the evidence that marine employers submit of intoxication in a timely manner. If the submitted evidence is inadequate to support civil penalties or S&R proceedings, the marine employer should be informed of specific discrepancies discovered so that adequate evidence is presented in future situations.
  - c. Enforcement. The OCMI or COTP have discretion on whether to decide if enforcement action should be initiated. Voyages shall be terminated by use of COTP orders or OCMI termination letters, unless there is another operator who is capable and properly licensed to operate the vessel. Civil penalties and/or S&R proceedings are appropriate for first offenses and threats to marine safety. Revocation is sought in those cases where severe injury or death occurs, or when the mariner is a repeat offender.
7. Labor-Management Disputes. IOs should not become involved in labor/management conflicts. If a contractual infraction did not affect the safety of the passengers, crew, vessel, marine environment, or national security, action against MMCs should not ordinarily be taken. This policy requires OCMI's and their department heads to remember that Coast Guard officers should not place themselves in roles as labor/management arbitrators. See 46 CFR 5.71; Appeal Decision 2470 (Giachetti).
8. Failure To Obey. Whenever the basis of a complaint is refusal or failure to obey an order, the evidence should show that the order was not in the nature of a request, that it was properly communicated to the person charged, that it was lawful, and that it was directly connected with the safe operations of the vessel.
9. Absence Over Leave (AOL), Absence Without Leave (AWOL), And Failure To Join. S&R proceedings should be brought for these offenses only when it can be established that the absence of the charged mariner created a situation in which the safety of the vessel, passengers, crew, or marine environment was adversely affected. The fact that the absence created a crew shortage below the complement required by the Certificate of Inspection (COI) usually establishes such an adverse effect. Whether the ship was in a foreign or domestic port does not itself determine the effect.
10. Oil Pollution Incidents. A personnel investigation shall be conducted in all instances when the actions or nonactions of a mariner apparently caused or contributed to the cause of an oil pollution incident (see paragraph 2.D.7.a below).

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- 2.A.11. Use Of Narcotics And Other Dangerous Drugs. Each instance shall be handled according to its merits (see subparagraph 2.D.6.a.(8) and 2.D.6.e below).

### B. Investigations Pertaining To MMCs.

#### 1. Initial Activities.

- a. Receiving Information. All proper complaints received shall be immediately investigated, regardless of the source of the complaint. During any type of investigation, the IOs function is to obtain all of the available facts. The IO should not, under any circumstances, be influenced by the interests of any particular person or group. In cases where an IO is personally involved in an incident which requires investigation, the involved officer may serve as a witness, but shall not conduct the investigation nor represent the Coast Guard at the hearing.
- b. Creation Of Personnel Case Files. A personnel case file shall be created if a complaint is made against an individual possessing MMCs, and during any investigation when possible action against MMCs is indicated. [NOTE: An entry in a vessel's Official Logbook does not necessarily require the creation of a case file.]
- c. Transfer Of Jurisdiction. During the initial phase of an investigation, it may become apparent that necessary information is available outside the jurisdiction of the local Marine Safety Office (MSO) or Marine Inspection Office (MIO). Generally, such information can be obtained by the local MSO or MIO for the appropriate marine inspection zone and forwarded to the IO conducting the investigation. However, if it is determined that all of the information needed is located in another zone and that anticipated Coast Guard action will be taken there, the investigation may be transferred to that zone. See subparagraph 2.C.10.
- d. Closing An Investigation Without Action. A case file should be closed when:
  - (1) Information indicates that the complaint is unwarranted, or that no further action need be taken by the Coast Guard; or
  - (2) When a complete investigation fails to produce evidence sufficient to prove a charge at an administrative hearing.In such cases, the investigation is closed locally by a written memorandum to file.
- e. Marine Safety Information System (MSIS). MSIS Transaction Guides are within the COMDTINST M5230 series and should be used, as appropriate, for personnel investigation activities.

#### 2. Processing Complaints.

- a. Agency And Industry Complaints. Occasionally, adverse information regarding persons possessing MMCs will be received from the Department of State (DOS), Federal Bureau of Investigation (FBI), the U.S. Customs Service, or from state and local authorities. Receipt of the information should be considered a "complaint" and

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- 2.B.2. a. (cont'd) investigated to determine what action is deemed appropriate. Effective liaison should be maintained with other Coast Guard units, federal, state, and local law enforcement agencies, as well as industry managers, shipping agents, maritime unions, marina operators, and the public. All complaints received from these sources shall be investigated.
- b. Official Logbook Entries. One source of complaints will be official logbooks. Coast Guard marine safety personnel should take every opportunity to examine vessel logs when on board a commercial vessel. In this regard, liaison with shipping agents and local company representatives can be beneficial, alerting investigative personnel to shipboard problems and arranging visits to arriving vessels. Official logbooks are required to be maintained as specified in 46 U.S.C. 11301. Additional guidance is provided in the official logbook (Form CG 706B) and Navigation and Vessel Inspection Circular (NVIC) 1-86.
- c. Written Complaints. Receipt of any letter of complaint concerning a mariner is sufficient reason to commence a personnel investigation. A written acknowledgment of receipt shall be made as soon as practicable.
- d. Telephoned Complaints. A telephoned complaint is sufficient to commence a personnel investigation. If possible, the identity of the caller should be noted by the IO and the information received verified by written correspondence.
- e. Disclosure Of Defects and Protection of Informants. The value of identifying and reporting hazardous or unsafe conditions to the Coast Guard has long been recognized. Under 46 U.S.C. 3315 Coast Guard personnel are prohibited from disclosing, except as authorized by the Secretary, the name of a licensed individual who reports vessel defects or imperfections in matters subject to regulations and inspections. This nondisclosure policy has for some time been extended to unlicensed persons as well. Additionally, 46 U.S.C. 2114 protects seaman from recrimination for notifying the Coast Guard of unsafe conditions or practices.
- f. Advance Notice Of Complaint. Rapport with local maritime managers should enable IOs to obtain information concerning personnel complaints before the vessel arrives in port. The IO need not wait for a formal request from the master or other vessel personnel before commencing an investigation, and should be ready to proceed upon the vessel's arrival.

### 3. Developing Information.

- a. Initial Resources. Upon receipt of a complaint, sufficient information should be obtained to determine the proper method and scope of investigation. Locator/Wanted Lists should be checked in all cases. If a verbal complaint is received, probing questions may be sufficient. If the complaint is written, review of local files, communications with Headquarters, and other activities may be helpful in generating sufficient information. The information initially received will determine what equipment the IO will need for further investigation. A notebook is always necessary, and sufficient copies of standard investigation forms should be available at all times. On some occasions, a portable tape recorder or camera may be necessary.

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- 2.B.3. b. Additional Resources. If initial investigation indicates possible S&R action against MMCs, available additional information and evidence should be obtained as quickly as possible. The information contained in official logbooks and Shipping Articles, for instance, is considered a minimal resource to be supplemented with statements from prospective witnesses, diagrams, photographs, etc. This supplemental information should be obtained even though it may not be used as evidence in subsequent actions. In very serious or complex cases, or instances of possible protracted delay before final action, statements signed under oath should be obtained from witnesses.
- c. Post Casualty Chemical Testing. 46 CFR 16.240 and 46 CFR 4.06 mandate that post casualty testing be conducted to determine if drugs or alcohol were contributing factors in a marine casualty. Serious marine incident chemical testing shall be done as soon as practicable to provide useful results for investigative purposes. This is especially important for alcohol testing, due to alcohol's relatively rapid elimination from the body.
- (1) Individuals To Be Tested. 46 CFR 4.06 require marine employers to take all practicable steps to test individuals involved in a serious marine incident for evidence of use of drugs and alcohol as soon as practicable after addressing the resulting safety concerns delineated in 46 CFR 4.06-1(e). There are limits concerning who can be directed to be tested after a serious marine incident. 46 CFR 4.06-1(c) states that a law enforcement officer (not necessarily federal) may determine that additional personnel are directly involved in the incident and shall undergo drug testing. The personnel who can be so designated are limited only to those directly involved in the incident and actually on board the vessel. This restriction is stipulated in the regulations by the phrase "any individual engaged or employed on board a vessel...", which appears in 46 CFR 4.06-1(b) and 4.06-5(a). Given this restriction, it is not feasible for the marine employer or the law enforcement officer to extend the requirement for testing to someone who is not actually on board the vessel, such as a dispatcher, drawbridge tender, or barge supervisor who issued orders to the master/operator of the vessel.
  - (2) Authorization For Chemical Tests. 33 CFR 95.035 authorizes chemical tests of individuals suspected of being intoxicated or directly involved in the occurrence of a marine casualty. Chemical tests should be directed whenever an individual appears to be intoxicated. Unlike mandatory chemical testing after a serious marine incident, chemical tests are not automatically required whenever an individual is involved in a marine casualty. Good judgement and careful consideration of the seriousness and circumstances of a marine casualty shall be exercised before directing chemical testing under 33 CFR 95.035.
  - (3) Drug Testing Procedures. 46 CFR 4.06 require that drug tests shall be conducted in accordance with (IAW) 49 CFR 40. A chemical test for drugs directed under the authority of 33 CFR 95 should also be conducted IAW 49 CFR 40. Coast Guard personnel shall not under any circumstances provide urine collection materials or perform as the collection site person. Coast Guard personnel may suggest local sources for those materials and services. Note: the Department of Transportation

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- 2.B.3. c. (3) (cont'd) (DOT) split sample procedures are not mandatory for the maritime industry. Marine employers may still use single specimen procedures, but if they elect to use the split samples, they shall use the DOT split sample procedures.
- (4) Alcohol Testing Procedures. The alcohol testing requirement in 46 CFR 4.06 and alcohol testing authorized in 33 CFR 95 may be conducted by either blood or breath samples. Only qualified Coast Guard or other local law enforcement personnel may perform breath tests, if such testing would be more timely than the testing arranged by the marine employer or if there is any concern that testing would not otherwise be accomplished. It is important to note that the DOT alcohol testing procedures in 49 CFR 40 are NOT applicable for the marine industry.
- d. Chemical Testing-General. Listed below are interpretations of the chemical testing regulations in 46 CFR 16.
- (1) Fishing Industry Vessels. Fishing industry vessels of less than 200 gross tons are not subject to the chemical testing regulations (46 CFR 4.06 & 16), because they are not required to be operated by individuals holding a Coast Guard-issued license. However, the "Operating a Vessel While Intoxicated" regulations at 33 CFR 95 are applicable to any fishing industry vessel. Also, tankerman required by 46 CFR 105 on commercial fishing vessels dispensing petroleum products are subject to the testing requirements of 46 CFR 16, for the same reasons discussed in paragraph (6) below.
- (2) Marine Employer Financial Status. The financial status of a marine employer, whether operating "for profit" or "not for profit" (i.e., charity), does not change the requirement for chemical testing.
- (3) Employee Payment Status. The payment status of an employee, whether he or she is a paid employee or serving as a volunteer, does not change the requirement for chemical testing if that person is a "crewmember", as defined in 46 CFR 16.
- (4) Uninspected Sailing School Vessels. Students on board uninspected sailing school vessels technically meet the definition of "crewmember" in 46 CFR 16 due to their involvement in the operation of the vessel. However, their primary purpose on board is as paying passengers, who the regulations are intended to protect. Due to the instructional nature of the vessel's operation, the licensed operator is ultimately operating the vessel. Therefore, students on these type of vessels are not subject to chemical testing under 46 CFR 16.
- (5) Exemptions. 46 CFR 16 does not authorize the Coast Guard to grant exemptions to the requirements for chemical testing.
- (6) Cargo Handling Personnel On Unmanned Barges. The regulations governing cargo handling (46 CFR 35.35 and 151.45-4) dictate the crew duty requirements for cargo transfer operations of unmanned barges. Both of those sections require that an individual with either the proper license, MMD endorsement, or letter of designation (for subchapter O cargoes) be on duty to perform transfer operations. That individual is deemed to meet the

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- 2.B.3. d. (6) (cont'd) definition of "crewmember" and is subject to the testing requirements of 46 CFR, Part 16.
- (7) Foreign Citizens. Foreign nationals employed on foreign flag vessels are not covered by 46 CFR 4.06 or 16. However, in the event of a marine casualty within U.S. waters, the provisions of 33 CFR 95 do apply. Foreign nationals who are employed on a U.S. vessel in a position which is required to undergo chemical testing are covered by 46 CFR 4.06 and 16.
- (8) Seasonal Employees. 46 CFR 16.210 state the exemptions for individuals who do not have to undergo pre-employment testing. Seasonal employees who do not meet one of these exemptions shall be pre-employment tested upon their return each season. All employees who are required to undergo chemical testing, whether they are seasonal or permanent, shall be included as part of the random testing pool during the time they are in the actual employment of the company. If a marine employer wants to retain an individual as an unpaid employee during the "off-season" and that individual fully participates in any required testing, he/she can be treated as a "returning" employee when they return to the payroll and will not need to be pre-employment tested. The same would hold true for a seaman returning to the same company after an absence (i.e., vacation or normal time off from being part of a blue/gold crew) during which the seaman was still considered an employee of the company (i.e., still receiving medical and/or other benefits). Individuals changing positions or ships within a company's fleet are not considered "new hires".
- (9) Other DOT Drug Tests. Drug test taken under the authority of another DOT agency cannot be used to satisfy the requirements of a Coast Guard required test. Even though all DOT agencies use the same drug testing procedures (49 CFR 40), their requirements concerning when a test is required and procedures for handling results differ.
- e. Fatal Flaws In Dangerous Drug Use Investigations. Commandant's Decision on Appeal (CDOA) number 2555 vacated a finding of proved for the use of dangerous drugs because of a fatal flaw in the chain of custody surrounding the test specimen in question. In that case, the collector neglected to obtain the donor's signature on the custody and control form. This flaw went undetected through the lab analysis, the Medical Review Officer (MRO) review and subsequent Coast Guard preferring of charges before the Administrative Law Judge (ALJ). The integrity of the chemical testing program relies on the strict compliance with prescribed procedures. IOs shall conduct a thorough review of all facts of a case before pursuing charges at an administrative hearing. Although the check of a specimen's chain of custody is the responsibility of the MRO, it is important that IOs review supporting material for their hearing to ensure that all applicable regulations have been complied with before proceeding with S&R proceedings. Failure to do so could result in wasted time and effort for all involved parties. The most significant piece of documentation available to the IO in a drug use case is the custody and control form. Flaws concerning this form considered "fatal" to the viability of a specimen for use in S&R proceedings are:



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- 2.B.3. e. (1) Specimen Identification Number (I.D.) on the specimen bottle and custody and control form do not match.
- (2) Collector's signature is omitted from certification statement.
- (3) Donor's signature, Social Security Number (SSN), or I.D. is omitted from custody and control form unless "refusal of donor to provide" is stated in the remarks section.
- (4) Chain of custody block is incomplete. There should be a minimum of two signatures, shipping entry, and date.

f. Action Required Upon Receipt Of Positive Chemical Tests. When a chemical test report indicates a positive result, the IO shall review it closely. If it appears that the test result is flawed due to the circumstances such as those listed above, the viability of pursuing further administrative action shall be evaluated. If the report appears to be complete, the IO shall ensure that the mariner is removed from any safety sensitive position, and initiate S&R proceedings. Questions regarding the seriousness of specific flaws and the viability of certain evidence for use in hearings should be addressed to Commandant (G-MAO-1).

g. MRO Drug-Free Certificates. 46 CFR 16.370 states that "before an individual who has failed a required chemical test for dangerous drugs may return to work, the MRO shall determine that the individual is drug free..." This determination is usually accompanied by a certificate from the MRO. This provision was included in the regulations to provide a means for individuals who do NOT possess MMCs to reenter the marine work force. Although these individuals do not possess MMCs, a positive test result still prohibits marine employers from employing these individuals. Without the MRO certificate provision, there is no way for an individual without MMCs to become re-eligible for employment in the marine industry.

(1) MRO Certificate Requirements Prior To A Hearing Or Surrender. Individuals with MMCs who have failed a chemical test, but who have not had their case adjudicated at a S&R hearing, or who have not yet surrendered their MMCs, shall obtain a MRO's Drug-Free Certificate before returning to work as undocumented seaman in a non-safety sensitive position.

(2) MRO Drug-Free Certificates Relating To Administrative Clemency. Possession of a MRO Drug-Free Certificate is not an alternative to the administrative clemency process for individuals who have had their MMCs revoked or surrendered for association with dangerous drugs. However, a MRO's Drug-Free Certificate may be presented for consideration as evidence of cure as part of the administrative clemency package. Individuals who have applied for, and have been granted Clemency are not required to obtain a MRO Drug-Free Certificate before returning to work.

#### 4. Interaction With Marine Boards Of Investigation.

a. General Principles. The OCMI in the port in which a marine board of investigation is held shall open a personnel case file as soon as sufficient information indicates possible S&R action against MMCs. This information may be obtained during the preliminary casualty investigation or from evidence received by the marine board. The IO or the IO's representative should arrange to attend those sessions

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- 2.B.4. a. (cont'd) the IO deems appropriate. Under no circumstances should a personnel investigation resulting from a marine casualty interfere with the work of the marine board. Liaison between the IO and the marine board recorder will provide a smooth flow of information which will be helpful to the personnel investigator, and possibly the marine board. The following actions might be considered:

- (1) Advise the recorder of any personnel investigation being contemplated; and
- (2) Request permission to interview witnesses after they have been questioned by the marine board.

b. Simultaneous Activities. Personnel investigations should be conducted after a marine board has convened only with the approval of the marine board chairperson. If the chairperson requests abeyance until the marine board adjourns, investigation activities should be suspended. This is often requested so that the marine board has flexibility in developing recommendations for submittal to the Commandant. However, this does not preclude initiation of S&R proceedings during the course of, or immediately following, the marine board investigation. If sufficient information in the personnel investigation is developed before the casualty investigation is completed, charges may be filed. Prior to any personnel action, however, the marine board chairperson should be notified and the chairperson's recommendations respected. If the marine board recommends S&R proceedings and a personnel investigation has not yet commenced, the IO should contact the recorder for the marine board to obtain the necessary initial information.

c. Further Development. If, upon review of the marine board of investigation report, the Commandant directs further personnel investigation, the IO shall obtain the initial information by the most expeditious means possible. Upon completion, a letter describing the final outcome of all personnel actions resulting from marine boards of investigations shall be forwarded to Commandant (G-MAO-1) by the IO.

5. Activities In Other Coast Guard Vessel Casualty Investigations.

Personnel investigations stemming from vessel casualties should begin as soon as possible and should not await the completion of the casualty report. If the personnel investigation is conducted by someone other than the casualty investigator, close coordination between the two will be necessary.

6. S&R Recommendations In Marine Casualty Reports. Recommendations in marine casualty investigation reports to initiate S&R proceedings against licensed or documented personnel shall be quickly and meaningfully acted upon. The ever increasing importance of investigations in the Coast Guard's marine safety programs, and resulting public awareness, mandate all reasonable efforts to accomplish these recommended actions. The execution of personnel investigations and the Commandant's policies for discipline on merchant vessels and maritime safety should result in meaningful, timely response to S&R recommendations in casualty investigation reports.

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### 2.B.7. Shipboard Investigations.

- a. Etiquette. When first boarding a vessel, the IO should report his or her presence and purpose to the master or senior deck officer. Reasonable efforts should be made to conserve the master's time.
- b. Privacy. Since most investigations require interviews of crewmembers, the IO should request the use of an area where privacy can be ensured. This will enable the IO to interview personnel privately, with as little distraction as possible. Witnesses should not be interviewed together.
- c. Review Of Logbook Entries.
  - (1) Adequacy. Log entries should be reviewed to ensure that they have been made in compliance with applicable law. If they have not, the master should be advised of the deficiencies to prevent recurrence in future entries. Since a log entry can, under some circumstances, serve as sufficient evidence to prove a charge in subsequent S&R proceedings, masters should be encouraged to provide ample information in the logbook, even to the point of making a special entry or attaching additional statements received during the master's investigation.
  - (2) Criteria For Investigation. Not every entry logged against a mariner should be considered a complaint. Only those entries showing a compromise of safety or hazard to life, property, and/or the marine environment or when the seaman has a history of repeated offenses should cause an investigation.
  - (3) Cancelled Entries. If a cancelled log entry indicates a condition serious enough to have warranted an investigation, the master should be questioned about the reason for cancellation. If the entry was merely in error, no further action need be taken.
  - (4) Review Prior To Voyage Termination. If the IO has boarded a vessel prior to completion of the voyage, the IO should review all log entries. Before departing the vessel, the IO should make an entry in the margin of the logbook, indicating what action the IO has taken and (as appropriate) what remains to be accomplished. This is particularly important when the mariner under investigation remains with the ship. Notations such as "Investigated" are insufficient; more detailed notations, such as "Investigated, reported to Commandant (G-MAO-1)," "Warned," "Investigated, no action taken pending further conduct on voyage," give IOs reviewing the logbook at the end of the voyage a clear picture as to what action should be taken.
  - (5) Final Port Of Voyage. Official logbooks should be reviewed by the final port of voyage in a timely manner to determine if actionable offenses occurred during the voyage.
  - (6) Emphasis On Correct Log Entries. Investigating personnel should be alert to the opportunity to advise ship's officers on the correctness of log entries. It should be emphasized to the master that log entries made in compliance with the applicable requirements often obviate the need for vessel personnel to appear as witnesses during S&R proceedings (this is important,

## MARINE SAFETY MANUAL

- 2.B.7. c. (6) (cont'd) considering their brief in port periods). The importance of attaching statements taken by the master and referring to them in log entries so that they will be accepted as parts of the log when presented as evidence should be carefully explained.
- d. Completion Of Investigation. The IO should, as far as reasonable, stay aboard the vessel until the investigation is completed. This will ordinarily be possible because most "leads" can usually be developed on the ship. However, if it appears that assistance is necessary, the Chief, Investigation Department should be notified so that the investigation can be completed as expeditiously as possible. The IO should strive to complete the investigation in sufficient time to avoid a delay in sailing. [NOTE: Vessels shall not be delayed for S&R proceedings without authority of the OCMI.]
8. Use Of Foreign Records. An official record or document of a foreign country may be evidenced by an authenticated copy, summary, or excerpt, under the Federal Rules of Evidence, Rule 902(3). That Rule provides that foreign records may be authenticated by a certificate made by a secretary of an embassy or legation, a consul general, consul, vice consul, or consular agent of the U.S. and authenticated by the seal of that person's office. A foreign official, so authorized by the laws of that official's country may also authenticate his or her country's documents. In many cases, properly authenticated foreign records of court actions, hospitalizations, etc., are important evidence. Prior to the hearing, the IO should make every reasonable effort to obtain such records. Foreign records must be translated, as necessary, and authenticated by an appropriate official. Assistance may be obtained from the office providing legal support.
9. Information Obtained From Consuls. Occasionally, information needed for a personnel investigation must be obtained from a U.S. consul; this may include court or medical records. OCMI's are authorized to correspond directly with U.S. consuls for the purpose of requesting routine records needed for personnel investigations. In many instances, however, the consul will be reluctant to release information without specific authority from superiors or he or she may have difficulty obtaining such records. In such cases, Commandant (G-MAO-1) should be notified so that the request for information may be forwarded to Department of State (DOS). This method also facilitates tracer action if information is lost in transit.
10. Issuance Of Subpoenas. The IO may issue subpoenas to obtain the attendance of witnesses or production of books, papers, documents, or other relevant evidence needed by the IO or by the person charged. During the hearing, the ALJ may issue subpoenas for these purposes. This may be done upon the ALJ's own motion, or upon request by the respondent or the IO. [NOTE: The power to issue subpoenas is provided by 46 U.S.C. 7705 and 46 CFR Part 5, Subpart F. The subpoena may be served anywhere within the judicial district in which it is to be returned; or if outside the district, at a place within 100 miles of the place to which it is returnable.]
11. Dual Investigations. On many occasions, information received during a Coast Guard investigation may be of importance to other federal, state, or local law enforcement authorities. These authorities should be notified at the earliest opportunity, to enable them to take early investigative action, if warranted.

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### C. Procedures In Lieu Of A Hearing.

1. Introduction. Investigations shall be conducted to provide as thorough information as possible, to determine what official action, if any, should be taken against mariners or their MMCs. S&R proceedings need not be used in all instances, but rather when marine safety or the marine environment has been directly and adversely affected. The severity of the act or offense, the gravity of the situation, availability of other corrective action, the prior history of the seamen, and the likely impact of such action on similar incidents in the future are factors which should influence the choice of actions taken. Consideration must also be given to the responsibilities of masters, owners, and operators of vessels in maintaining the standards of competence and disciplined conduct in the U.S. Merchant Marine. Civil penalty action against holders of MMCs is authorized at the discretion of the OCMI. Additional guidance is contained in Volume I of this manual.
2. Letters Of Warning. Written warnings shall be issued when investigation indicates that there is a basis for some remedial action under 46 U.S.C. Chapter 77, but that the act or offense under investigation was of a relatively minor nature. These letters of warning should not be confused with letters issued by the district commander in lieu of civil penalty proceedings. Personnel action letters of warning are issued by the IO when they are deemed to be more appropriate than pursuing S&R proceedings. The Letter of Warning should not contain direct allegations of negligence or any other term by which civil liability or responsibility might be construed by the mariner's acceptance of the warning. A sample letter is shown on Figure 2-1.
  - a. Procedure For Giving Warnings. 46 CFR 5.105(e) provides for giving warnings to mariners. When the IO determines that this will best resolve the matter, the IO shall prepare a Letter of Warning to the mariner. Whenever practical, the letter shall be personally delivered by the IO with receipt acknowledged on the unit copy. The receipted copy of the warning letter and the mariner's statement regarding his or her prior record should be filed in the office file. Before delivery of the letter, the mariner should be questioned, under oath, regarding his or her prior record. The mariner should be warned that failure to acknowledge current remedial or disciplinary actions (e.g., recent warnings for the same offense or a recent order of suspension or probation) or materially misrepresenting the mariner's record, will be considered an act of misconduct, and the mariner may be brought to an S&R proceeding. The mariner should sign a statement regarding his or her prior record, which explains the mariner's rights and reemphasizes the mariner's right to counsel. The IO shall then advise the mariner that the IO believes a Letter of Warning to be sufficient to resolve the matter, and that charges will not be preferred if the letter is accepted. The IO should be prepared to prefer charges under the appropriate specification(s) at the time that the letter is prepared, as the mariner's refusal to accept the letter normally results in the IO preferring charges formally. Should the mariner state a desire to consult counsel before accepting a letter of warning, the IO shall provide this opportunity. If the mariner is a local resident or the IO is confident the mariner will cooperate in the future service of a letter of warning or a charge sheet, the IO may rely on the seaman without the necessity of a good-faith deposit or serving charges at that time. A reasonable time, up to 30 days or longer with good cause, should be allotted for this purpose. If the IO has reason to doubt the future availability of the seaman, a good-faith deposit

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## FIGURE 2-1

### SAMPLE LETTER OF WARNING

16722/123  
12 June 1995

Mr. Bruce Adam  
557 Land High Drive  
New Orleans, LA 70142

Dear Mr. Adam:

An investigation has revealed the following conduct on your part while serving aboard the M/V SEA LION under authority of Merchant Mariner's Document No. 123-45-6789: While serving as able seaman aboard said vessel on 5 and 6 June 1995, you failed to report for work; and on 7 June 1995, you failed to perform your assigned duties as oiler on the 0800 to 1200 watch.

In consideration that justice will be best served by a warning rather than a formal proceeding against your document, you are hereby given a written warning for your conduct as set forth above.

You are advised that this warning will become a part of your record at Coast Guard Headquarters, Washington, DC, and will be considered at any future proceedings involving your document. If you feel this warning is not warranted, you may refuse to accept it. However, your refusal may result in your being charged for a formal hearing before an administrative law judge under Title 46 U.S.C. Chapter 77, in which case this warning will be withdrawn.

Sincerely,

G. R. SEA  
Commander, U.S. Coast Guard  
Chief, Investigation Department

\* \* \* \* \*

The foregoing has been fully explained to me and I accept this warning without admitting any civil liability on my part or on the part of the M/V SEA LION, the owner(s) and operator(s). I acknowledge that I have no prior disciplinary record with the Coast Guard (or, 'my record is as follows':).

[Signature of Mariner]

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- 2.C.2. a. (cont'd) of his or her MMCs shall be sought. If the mariner expresses a desire to meet with counsel and declines to make a good-faith deposit of the MMCs, the IO should serve charges; if the mariner responds to the IO in sufficient time, the charge will be withdrawn. The object here is to impress on the mariner that, while the mariner has the right to legal advice, some type of official action will result (i.e., the acceptance of the Letter of Warning or formal charges under 46 U.S.C. Chapter 77). In exceptional cases, where distance or other factors preclude personal delivery of the Letter of Warning, it may be mailed by certified mail, return receipt requested, for delivery to the addressee only. In these cases, the IO should verify, before issuing the letter, that the mariner will accept the letter. The mariner should be requested to sign and return a copy of the letter.
- b. Reports Of Letters Of Warning. The 3x5 index card mailed to Commandant (G-MAO-1) is no longer required when a Letter of Warning is issued. This information should now be entered in MSIS. Explanation of the nature of the offense should be confined to the "comments" section of the electronic entry. A supplemental letter to Commandant (G-MAO-1) is not required. Letters of Warning are not releasable to the public under FOIA.
3. Voluntary Deposit Of MMCs For Mental Or Physical Incompetence. Under the provision of 46 CFR 5.201, a Voluntary Deposit can only be offered in cases where there is evidence of mental or physical incompetence. A medical condition by itself is not incompetence; for example, an epileptic who can control the condition through medication should not be charged with incompetence unless evidence is available that his professional performance is hindered by his condition. If the condition prevents the mariner from performing duties directly related to the safe operation or navigation of the vessel, a voluntary deposit may be properly considered. Prior to accepting a voluntary deposit, the IO shall explain to the mariner that the deposited MMCs cannot be returned until the Coast Guard receives satisfactory evidence that the mariner is considered fit for duty without qualification, and that the mariner must initiate action to regain his or her MMCs. If the mariner agrees to these conditions, the IO shall complete a Voluntary Deposit Agreement, Form CG-2639F, in triplicate. After the mariner has signed all three copies in ink, the IO shall give the original to the mariner and retain a copy in the investigative file. The remaining copy of Form CG-2639F shall be forwarded to: Director, National Maritime Center- (NMC4A), U.S. Coast Guard, 4200 Wilson Blvd, Suite 510, Arlington, VA 22203-1804, for inclusion in the mariner's seaman's jacket.
- a. Mariners Deemed Incompetent Who Do Not Enter Into A Voluntary Deposit. When a mariner who has been certified by proper medical authority as physically or mentally incompetent will not voluntarily deposit his or her MMCs, and it appears that the mariner is a threat to shipmates, and has signed on a vessel or otherwise acted under authority of his or her MMCs while incompetent, S&R proceedings shall be initiated.
4. Voluntary Deposit Of MMCs For Addiction To Dangerous Drugs As A Cause Of Incompetence. 46 CFR 5.201(b) states that use of a voluntary deposit can only be accepted where mental or physical incompetence has occurred resulting from use of, or addiction to dangerous drugs. The use of a voluntary deposit is only appropriate in those instances where the use and/or addiction is "not discovered as a result of a Federal, State or local government investigation". For Coast Guard purposes, the discovery of a drug problem through the chemical testing mechanisms of 46 CFR 16 is considered to be discovered as part of an "investigation" and therefore

## MARINE SAFETY MANUAL

2.C.4. (cont'd) a voluntary deposit shall not be used.

- a. Voluntary Deposits In Drug Investigations. The IO shall screen all requests for voluntary deposit to ensure that the request has not been prompted by a Coast Guard mandated chemical test. This includes mariners who are scheduled to take a test, but feel, or know they will have a positive result, and those who have been notified by a MRO of a positive test. All cases shall be handled through the voluntary surrender, settlement agreements or hearing process. Voluntary deposits which are discovered to have been prompted by a positive chemical test shall be considered "null and void" and the MMCs returned to the individual, together with a charge sheet and an explanation of the options available.
  - b. Acceptance Of Voluntary Deposits. Where the mental or physical incompetence of a holder of MMCs is caused by use of, or addiction to dangerous drugs, a voluntary deposit will only be accepted contingent on the following circumstances:
    - (1) The holder is enrolled in a bona fide drug rehabilitation program;
    - (2) The holder's incompetence did not cause or contribute to a marine casualty;
    - (3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, state, or local government investigation, (see 2.C.4.); and
    - (4) The holder has not voluntarily deposited or surrendered his or her MMCs, or had his or her MMCs revoked for a drug related offense on a prior occasion.
5. Voluntary Deposit Of MMCs For Alcoholism As A Cause Of Incompetence. 46 CFR 5.201(c) states that the use of a voluntary deposit can only be accepted where mental or physical incompetence has occurred resulting from use of, or addiction to alcohol. The use of a voluntary deposit is only appropriate in those instances where the use and/or addiction is "not discovered as a result of a Federal, State or local government investigation". For Coast Guard purposes, the discovery of an alcohol problem through the chemical testing mechanisms of 33 CFR 95 or 46 CFR 4.06 are considered to be discovered as part of an "investigation" and therefore a voluntary deposit shall not be used. The Coast Guard recognizes alcoholism as a disease and acknowledges that there are successful programs for the prevention and treatment of alcoholism. It is not the Coast Guard's policy to compel merchant mariners with alcoholism to enter such programs, but rather to encourage sincere individuals to obtain the medical help they need. While the Coast Guard cannot endorse or recommend a specific facility or program, the IO should be familiar with locally available resources to enable him to provide information to merchant mariners requiring assistance of this nature.
- a. Voluntary Deposits In Alcohol Abuse Investigations. In considering S&R proceedings for offenses involving alcohol, the IO must recognize the distinction between the disease of alcoholism and mere intoxication or alcohol abuse. It is not intended that misconduct involving mere intoxication should be punished any differently than instances of "sober" misconduct. However, if alcoholism, alcohol



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- 2.C.5. a. (cont'd) abuse, or intoxication is considered to be a factor in the case, it is appropriate to charge the offender with "incompetence based on alcoholism," in addition to any misconduct charge. On this basis, cases involving alcoholism should be handled in a manner similar to other cases of physical or mental incompetence. Probative evidence of rehabilitation may be accepted by the ALJ in arriving at a final determination regarding the mariner's competency. Similar evidence may be accepted by the IO to support the return of voluntarily deposited MMCs.
- b. Acceptance Of Voluntary Deposits. Where the mental or physical incompetence of a holder of MMCs is caused by use or addiction to alcohol, a voluntary deposit will only be accepted contingent on the following circumstances:
- (1) The holder is enrolled in a bona fide alcohol rehabilitation program;
  - (2) The holder's incompetence did not cause or contribute to a marine casualty; and
  - (3) The incompetence was reported to the Coast Guard by the individual or any other person and was not discovered as a result of a Federal, state, or local government investigation, (see 2.C.5).
6. Written Agreement. A holder may deposit his or her MMCs with the Coast Guard in any case where there is evidence of mental or physical incompetence as described above. A voluntary deposit is accepted on the basis of a written agreement, the original of which will be given to the holder, which specifies the condition upon which the Coast Guard will return the MMCs to the holder.
- a. Limiting Conditions For Voluntary Deposits. Where the conditions of paragraphs 2.C.4. or 2.C.5. above are not met, the holder may only surrender his or her MMCs in accordance with 46 CFR 5.203, or S&R proceedings must be initiated.
7. Disposition Of Deposited MMCs. If, in the IO's opinion, the mariner is likely to be eligible for return of the deposited MMCs within a relatively short time (i.e., 1 year or less), the MMCs should be retained locally. If return eligibility is unlikely, or more than 1 year has passed, the deposited license or COR shall be forwarded to the issuing Regional Examination Center (REC) with a memorandum including a brief summary of the case. A copy of the memorandum shall be forwarded to NMC4A, for inclusion in the mariner's record. Deposited MMCs shall be forwarded to NMC4A with a memorandum including a brief summary of the case. (See address 2.C.3.)
8. Return Of MMCs. A person may request the return of his or her voluntarily deposited MMCs at any time, provided he or she can demonstrate a satisfactory rehabilitation or cure of the condition which caused the incompetence; has complied with any other conditions of the written agreement executed at the time of deposit; and complies with the physical and professional requirements for issuance of MMCs.
- a. Return Where Drug Abuse Was Cause Of Incompetence. Where the voluntary deposit is based on incompetence due to drug abuse, the deposit agreement shall provide that the MMCs will not be returned until the person:

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- 2.C.8. a. (1) Successfully completes a bona fide drug abuse rehabilitation program;
- (2) Demonstrates complete non-association with dangerous drugs for a minimum of 6 months after completion of the rehabilitation program; and
- (3) Is actively participating in a bona fide drug monitoring program which incorporates random unannounced chemical testing.
- b. Return Where Alcohol Abuse Was Cause Of Incompetence. Where the voluntary deposit is based on incompetence due to alcohol abuse, the deposit agreement shall provide that the MMCs will not be returned until the person:
- (1) Successfully completes a bona fide alcohol abuse rehabilitation program; and
- (2) Is actively participating in a bona fide support group.

9. Acceptance Of Medical Reports. A medical report indicating that a mariner is fit for duty need not be accepted without question. The designation of fit for duty requires a careful evaluation balancing the mariner's past medical history, his or her current physical/mental condition and future medical outlook against the person's ability to live and perform safely in a shipboard environment. In some instances, this evaluation may be reasonably conducted by the IO, and the deposited MMCs may be returned to the mariner. The IO may consult with a physician concerning a mariner's prior medical history and shipboard duties for this purpose. Prior to releasing the medical history to the physician, the consent of the mariner shall be obtained. In certain instances, however, a proper evaluation will be considered to be beyond the scope of an IO's expertise and discretion. These instances include cases involving:

- a. Convulsive disorders, such as epilepsy;
- b. Psychiatric illnesses; and
- c. Complicated or conflicting medical data in which the mariner's ability to live and perform safely in a shipboard environment is unclear to the IO.

In such instances, the mariner's medical history, along with pertinent physician's evaluation, and the IO/OCMI case remarks shall be forwarded to Commandant (G-MAO-1) who will request a determination from the Chief Medical Officer of the Coast Guard. In the event that the Commandant determines that the mariner is permanently not fit for sea duty, S&R proceedings for incompetence should be initiated.

10. Good-Faith Deposits. The mariner may make a "good-faith" deposit of his or her MMCs to the IO conducting an investigation, when the mariner desires that any action be taken at a different port, or when the mariner requests a delay for any reason and the IO agrees. This process ensures the mariner's appearance at another time or place. The IO should agree to a change of date or location only if satisfied that it will not prejudice the government's position. Before agreeing to a change the IO should consider the availability of:

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- 2.C.10. a. An ALJ;
- b. Witnesses and the reliability of documentary evidence; and
- c. A hearing room and medical facilities.

Transfer of jurisdiction strictly for the convenience of the mariner should be done only if the mariner is willing to make a good-faith deposit; otherwise, a charge sheet should be issued. In cases for which there is evidence of misconduct, when the mariner requests that the case be transferred to another office, the IO should prefer charges; at the initial hearing, the mariner can request a change of venue (location) from the ALJ. The ALJ can so order, provided that change of venue will not adversely affect the government's case and is not requested solely for purposes of delay. In cases when the sailing of a vessel precludes immediate convening of a hearing, subpoenas should not be issued to compel attendance. Rather, the investigative file should be forwarded to the OCMJ at the port of destination, with a request for an IO to meet the vessel. A good-faith deposit **shall** not be accepted from an individual who must continue to serve under his/her MMCs in order to meet the vessel's obligations or if the mariner is attempting to complete a alcohol/drug rehabilitation program.

11. Voluntary Surrender. 46 CFR 5.203 contains provisions for voluntary surrender of MMCs in lieu of a hearing to answer pending charges. Before agreeing to accept voluntarily surrendered MMCs, the IO shall ensure that the mariner is:
- a. Shown a copy of the charges, and informed of a definite time and place for a hearing on those charges;
- b. Advised of the right to counsel at the hearing; and
- c. Informed of the possible consequences, favorable and unfavorable, of a hearing.

Before accepting a voluntary surrender of MMCs for any act or offense, the IO should be satisfied that revocation would be the likely outcome of hearings into the matter under investigation. A voluntary surrender is equivalent to a revocation; the only means for the mariner to have his or her MMCs restored is the administrative clemency procedure (see 46 CFR 5.901). [NOTE: The Commandant reserves the right to return MMCs which have been voluntarily surrendered.] The IO shall ensure that the mariner's rights and the consequences indicated above are understood by the mariner before entering into a voluntary surrender agreement. If the person persists in the desire to surrender his or her MMCs, a written agreement may be executed on Form CG-2639E, in triplicate. All copies shall be signed in ink by the mariner and the IO and any witnesses. The original agreement shall be given to the seaman with copies to the unit file and to NMC4A (see address in 2.C.3) for inclusion in the mariner's record. The surrendered license or COR shall be forwarded to the issuing REC with a memorandum including a brief summary of events. A copy of the memorandum shall be forwarded to NMC4A for inclusion in the mariner's Surrendered MMDs shall be forwarded to NMC4A with a memorandum including a brief summary of the case.

12. Settlement Agreements. A settlement agreement is a Joint Motion of Settlement and Request for Entry of Consent Order made between an IO and respondent, and offered to an ALJ. A settlement agreement is designed to

## MARINE SAFETY MANUAL

2.C.12. (cont'd) expedite the administrative hearing process, not by pass it. The IO should review the case prior to making a decision on the use of a settlement agreement. **A settlement agreement shall not be used when there is a charge of incompetence** Additionally, if an investigation indicates there was intentional misconduct or negligence which caused injury, death, damage to property, or environmental damage, a settlement agreement shall not be used. In a case where the respondent does not contest the charge(s), and a strong message shall be made, the IO has the option of insisting that the settlement agreement be signed during an appearance before an ALJ. Questions concerning the proper use of settlement agreements should be addressed to Commandant (G-MAO-1).

a. Procedure. A settlement agreement can only be offered after the charge(s) have been served on the respondent. Figure 2-2, is an example of a Joint Motion of Settlement and Request for Entry of Consent Order and is intended to be a guideline which may be tailored as required. For a settlement agreement to be valid, the respondent shall agree:

- (1) The charge(s) and specification(s) are legally sufficient;
- (2) To accept the plea of "no contest" for each charge and specification, and the charge(s) and specification(s) be found proved;
- (3) To waive the right to appear before an Administrative Law Judge at a hearing; and
- (4) If the IO feels that the respondent must waive the right to seek judicial review regarding any provision of the agreement and/or to otherwise contest the validity of the consent order or the agreement, and the respondent does not agree, a settlement shall not be made. However, where the IO does not have reason to insist on the waiver, then a settlement should be made without the respondent waiving that right. It is important for the IO to understand that even though a respondent waives his or her right of appeal, if the agreement was made by coercion or misinformation, etc., the agreement may be voided by the ALJ.

If the MMCs is to be suspended or revoked, the respondent shall surrender his or her MMCs with the Coast Guard prior to signing the settlement agreement.

b. Sanction. The settlement agreement adds a new dimension to the adjudication of a case. In a hearing, the ALJ can only impose sanctions against the MMCs. A settlement agreement allows the IO to impose remedial actions such as specific training, or the SWEENEY requirements for cure. Sanctions should be based on 46 CFR 5, Table 5.569 - "Suggested Range of an Appropriate Order", or case history from CDOAs. The IO should also be specific in the words used in the sanction(s) requested. Any remedial actions proposed should be designed to correct the cause of the misconduct or negligence. The agreement should also contain a provision to impose an additional sanction if the respondent fails to comply with any of the conditions set forth in the agreement. The provision should be specific in nature, i.e., if the mariner fails to complete a required training school, or provide required documentation, an additional (X) months of suspension or outright revocation would result.

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## FIGURE 2-2 SAMPLE SETTLEMENT AGREEMENT

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

*****			CITY AND STATE
* IN THE MATTER OF	*		DATE
* LICENSE NO. (Lic. #)	*		CASE NO. PA
*	*		DOCKET NO.
* MERCHANT MARINER'S DOCUMENT	*		
*	*		
* (MMD # )	*		Joint Motion of Settlement
*	*		and Request for Entry of
* ISSUED TO	*		Consent Order
* (respondent's name)	*		
*****			

The following is a joint motion between the United States Coast Guard and the respondent, (Mr./Ms. respondent's name).

1. Come now the United States Coast Guard and the Respondent, and make a joint motion to request that a Consent Order be issued by the Administrative Law Judge in the present case. The parties to this motion respectfully request that the Consent Order find that the charges and specifications in the above captioned case be found legally sufficient; that the plea of "no Contest" by the Respondent be accepted, that the charges and specifications in the above case be found proved; that the sanction be (enter in detail the proposed sanction, i.e., revocation, stayed for 18 months upon completion of requirements in paragraph 2., suspended or 12 months, 6 months outright, etc.); and that the Coast Guard retains possession of the captured (license/document); and that the hearing scheduled for this matter be cancelled. In support thereof, the parties agree to the following:
2. Both the United States Coast Guard and the Respondent agree that the Respondent ( list type of remedial training required, i.e., shall successfully complete, through a Coast Guard approved maritime institute, the following courses...; Enter into a bona-fide drug/alcohol abuse rehabilitation program. List all the steps and requirements that the respondent shall complete.)
3. Further, both parties agree that the Respondent shall satisfactorily complete the requirements of paragraph 2, and provide documentation of completion. The certificates or documentation shall be mailed to the Investigations Department at Marine Safety Office (enter unit). (Enter any additional modification, i.e., If the respondent completes the above requirements, and the Respondent does not commit any offenses during (the sanction period, probation period, etc.). The Decision and Order will be amended to an (Administrative Law Judge's Admonition Letter of Warning, Investigating Officer's Letter of Warning, etc.) The Respondent also understands that if (he/she) violates any Coast Guard regulation or maritime law, and or fails to complete the requirements in paragraph 2, during (the sanction period, probation period, etc.), the captured (license/document) will be (revoked/suspended for (X) months) outright and could face additional action against the captured (license/document).
4. Respondent understands and knowingly and intentionally waives the right to challenge or contest the validity of the order entered in accordance with this agreement, and to all rights to seek judicial review or otherwise contest the validity of the consent order.
5. Both the United States Coast Guard and the Respondent agree that this order will have the same force and effect as an order made after a full hearing. It is also understood that the respondent was advised of (his/her) due process right to a hearing (and that the Respondent knowingly and intentionally waived that right).

Respondent \_\_\_\_\_

Investigating Officer \_\_\_\_\_

Witness \_\_\_\_\_

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- 2.C.12. b. (1) Requested Documentation. A pre-hearing settlement agreement will reduce the amount of preparation time required for a hearing. However, it is important that the IO keep track of the submitted documents and other evidence required by the agreement, especially in drug cases.
- (2) Settlement Agreements In Drug Cases. Settlement agreements in drug cases shall use the standard for "cure" as defined in CDOA 2535 (SWEENEY), except for cases involving convictions (see 46 U.S.C. 7704(b)). The IO shall seek revocation stayed on suspension. The length of the suspension shall be based upon the time required to complete the in/out patient drug abuse program. The suspension shall include the mandatory 1 year non-association period required after completion of treatment. The IO shall require that the respondent provide an appropriate amount of random, unannounced drug tests during the 1 year non-association period. The sanction should also require all documentation and proof be submitted at the end of the suspension period. This is recommended to reduce the need for the IO to perform follow up checks on the respondent during the suspension period. It is important that the respondent understand the he or she is solely responsible for submitting all required documentation on time. If the respondent fails to comply with the conditions of the agreement, a default motion shall be filed with the ALJ, requesting outright revocation. If the respondent meets the conditions of the order, a motion is put before the ALJ requesting the order of revocation be put aside (with the charge(s) and specification(s) proved) and the MMCs returned.
- c. Decision and Order. If the ALJ accepts the agreement, a decision and order based upon the consent agreement is issued which has the same force and effect as an order made after a full hearing. If the consent agreement results in revocation of the MMCs, the mariner must comply with the administrative clemency provisions for issuance of a new MMCs. (For the disposition of MMCs which are revoked see 2.C.7).
13. Referral To The Department Of Justice (DOJ). When investigation reveals evidence of criminal liability on the part of a mariner, that evidence shall be transmitted to the local U.S. attorney for appropriate action. If such evidence indicates criminal liability within the jurisdiction of a state or locality, it should be forwarded to the district commander (d1) with a recommendation for referral to the appropriate prosecutor.

### D. Charges And Specifications.

#### 1. "Charge Sheet," Form CG-2639.

- a. Service. 46 CFR 5.107 sets forth the requirements for preparation and service of charges and specifications. Form CG-2639, Notification with Charge and Specification, shall be used in the preparation of charges and specifications for S&R proceedings. To initiate proceedings, the IO shall prepare the "charge sheet" with all charges and specifications listed, including notice of the time and place of the hearing. The charge sheet shall be served personally upon the mariner charged or by certified mail with return receipt requested, signed by the addressee (mariner) only. The form must be served sufficiently in advance of the time set for the hearing so that the mariner (the "respondent") has a reasonable opportunity to prepare a defense. When the charge sheet is

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2.D.1. a. (cont'd) personally served on the mariner, the person making the service shall give the original of the form to the mariner, read the entries on the form to the mariner, and record the date and time of service on the file copies of the form. Further, whether the charge sheet is personally served or delivered by certified mail, the respondent shall be advised of the following:

- (1) Nature of S&R proceedings and the possible results thereof;
- (2) Right to have counsel (a lawyer or any other person whom the mariner desires) represent the mariner in the hearing;
- (3) Right to have witnesses and/or records subpoenaed in the mariner's behalf;
- (4) Effect of the failure of the respondent to appear at the time, date, and place specified for the hearing may result in the hearing being held in absentia; and
- (5) If the alleged offense involves mental incompetence, mariners shall be advised at the time of service to be represented by counsel at the hearing. If the allegation involves mental or physical incompetence, mariners shall be advised that they may submit evidence of medical examination in their behalf.

b. Refusal To Acknowledge Charge Sheet. Should a mariner being charged refuse to sign or accept the charge sheet, the person making the service shall testify to this at the hearing. The person making the service shall also testify to the advice given concerning the respondent's rights and the latter's response.

### 2. Charges.

a. Types Of Charges. Types of charges which may be initiated are specified in 46 CFR 5.23. They include:

- (1) Misconduct as defined in 46 CFR 5.27;
- (2) Negligence as defined in 46 CFR 5.29;
- (3) Incompetence as defined in 46 CFR 5.31;
- (4) Violation of law or regulation as defined in 46 CFR 5.33; and
- (5) Conviction for a dangerous drug law violation, use of dangerous drugs, or addiction to the use of dangerous drugs as defined in 46 CFR 5.35.

b. Multiple Charges. In some cases, the evidence at hand may indicate that more than one offense has been committed; for example, evidence may indicate that a mariner should be charged with both misconduct and incompetence. It is permissible and appropriate to prefer as many charges as necessary based upon the evidence obtained in the investigation.

### 3. Specifications.

a. General Considerations. A specification identifies the basis for the

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- 2.D.3. a. (cont'd) charge (which is broadly stated). It enables the respondent to identify the alleged offense so that the respondent can prepare an adequate defense. The language of the specification should be simple and concise. It must allege the elements of the offense and jurisdiction, but need not allege matters in aggravation. It should be specific; such phrases as "various other dates" are unacceptable. The IO must prove all facts alleged in a specification; therefore, facts that have no bearing on the elements of the offense should not be included (care must be taken, however, not to omit necessary information). For example, in a case of assault and battery, it is necessary to indicate the nature of the offense by stating ". . . by striking and beating with his fists" to state explicitly the nature of the charge. In cases involving intoxication, inclusion of that fact in the specification puts the respondent on notice that he or she cannot claim a failure to perform was not wrongful; because the mariner was available to perform the duty but was too incapacitated to do so. Matters in aggravation should not be included in the specification.
- b. Multiple Offenses. At times, a mariner may be absent from the mariner's vessel, or fail to perform duties, for a number of consecutive days. In these cases, it is proper to allege a continuous offense in one specification (i.e., ". . . did fail to perform your duties on the following dates. . ."). Except in such cases, only one offense may be set forth in each specification. However, a respondent may, by the facts of a particular situation, be found guilty of more than one instance of misconduct in the course of a voyage. In other cases, the IO may be confronted with facts constituting several offenses, arising from the same event or series of events. In such cases, the different offenses amounting to misconduct may be set forth in as many specifications as necessary. Caution must be taken not to "pile up" specifications nor to be redundant. If a specification contains elements of other offenses included in the offense charged only the offense which includes the others need be set forth. For example, assault alleged in one specification of assault and battery need not be repeated separately, because assault is a lesser included offense.
4. Guidelines For Negligent Operation Proceedings. The guidelines listed herein are not to be construed as limiting the IO's discretion in any way; they neither obligate the IO to prefer charges in certain circumstances nor do they restrict the IO's authority to prefer charges when such action is deemed appropriate. Furthermore, the examples and principles cited are not intended to be all-inclusive or rigidly applied to all situations; specifically, the absence in a real life scenario of one or more of the examples of prudent practices may or may not constitute negligence. Instead, these guidelines are meant to reemphasize the use of careful investigative procedures when considering suspension and revocation action and to reiterate sound hearing techniques for presenting negligence cases.
- a. Negligence Versus Error In Judgment. When investigating marine casualties or incidents involving potential negligent navigation, a careful evaluation of all appropriate factors should be made to discern whether a mariner's conduct constitutes negligence or error in judgment. In this respect the IO should carefully study both individual decisions as well as the entire context of a mariner's sequential actions preceding the accident. Listed below are some general elements which may be considered when making this determination:



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- 2.D.4. a. (1) The prudent mariner is not expected to exhibit complete infallibility or perfect judgment. However, the prudent mariner should seek out all reasonably available information in advance on potential events or conditions which may affect the vessel's safety. Examples of this could include, but are not limited to, obtaining broadcast and local notices to mariners; initiating timely radio communications concerning vessel traffic conditions, or other situations which may affect safe navigation such as bridge openings, and lock and dam schedules; obtaining on-scene and forecast environmental conditions; researching physical restrictions posed by confined waters and bridges; and considering the available maneuvering options in advance.
- (2) The prudent mariner should also be continually aware of the vessel's physical and maneuvering characteristics, its operational capabilities and limitations, and the vessel crewmembers' duties and capabilities. The prudent mariner should be especially aware of his own limitations. He should plan appropriately as indicated above prior to entering unfamiliar waters; or if faced with an unfamiliar situation he should consider requesting the assistance of more experienced personnel.
- (3) The prudent mariner should then use reasonable foresight based on the available information in anticipating potential navigational dangers or predicaments and in considering various courses of action to best avoid hazardous situations.
- (4) The fact that a navigational accident causes damage is not necessarily indicative of negligence having occurred nor is the fact that little or no damage results necessarily indicative of no negligence having occurred. Again the IO should primarily focus on the mariner's actions or omissions preceding the accident. However, when negligence is detected, the degree of damage may be evaluated along with other appropriate factors in determining whether to initiate S&R proceedings or other remedial actions.
- b. Evidence Of Negligence And Misconduct. Investigations should not be limited to negligence when specific elements of misconduct may be involved. These may include violation of the Navigation Rules, navigation safety regulations, or other established laws or regulations. Common examples of conduct which may constitute negligence, misconduct, and violation of law or regulation include, but are not limited to, the failure to maintain a proper lookout, failure to test steering or propulsion systems before entering port or getting underway, failure to have available or to use required navigational charts, publications, or equipment.
- c. Specific Acts Versus Presumption. Charging a mariner with a particular act of negligence based on specific evidence is always preferable to charging the individual with negligence based solely on a presumption. For this reason and whenever practicable, evidence should be vigorously sought and fully developed concerning any specific acts or omissions, which singly or in combination constitute negligent behavior. See Appeal Decisions 2455 and 2465.
- d. Respondent's Rebuttal. When only a presumption of negligence exists, the IO has the discretion to determine whether or not charges are appropriate. As previously indicated, this decision should be based

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- 2.D.4. d. (cont'd) on a careful evaluation of all pertinent information available. However, if charges are preferred and the respondent presents evidence at a hearing concerning his version of events, the IO should be ready to rebut that evidence. The IO should not rely on the ALJ to announce during the hearing whether the respondent has provided a "credible, nonfault explanation" for his actions. The IO should therefore expect as a worst case scenario that the ALJ will consider the presumption of negligence to have been rebutted and that the burden to proceed will shift back to the Coast Guard. As a minimum, the IO should be well prepared to strenuously cross-examine the respondent or the respondent's witnesses. Other options include the calling of Coast Guard rebuttal witnesses, expert or otherwise, and the presentation of any additional Coast Guard rebuttal evidence, to counter the respondent's explanation.
- e. Opening Statement. Whether charging a mariner with actual or presumed negligence, the IO should briefly, but clearly, outline in his opening statement at the hearing the basis for the Coast Guard's determination that the respondent's acts or decisions were negligent; the nature of the applicable standard of care by which the respondent's action were measured; and the exact nature of the evidence which will be presented to prove the charge. The importance of this initial step in the hearing cannot be overemphasized. It affords the IO the first and best opportunity to focus the ALJ's attention on the exact issues the Coast Guard feels are pertinent and to begin establishing the validity of the Coast Guard's case.
- f. Standard Of Care. The IO may establish an applicable standard of care in several ways. These include, but are not limited to, submission of expert witness testimony concerning prudent marine practices; reference to existing laws or regulations such as the Navigation Rules or navigation safety regulations which require specific acts under various conditions; reference to existing Commandant's Decisions on Appeal which address prudent marine practices; reference to other well known publications which address the subject such as Griffin On Collision, Knight's Modern Seamanship, Tug, Tow and Pilotage, and United States Coast Pilots.
- g. Official Notice. While 46 CFR 5.541 specifies certain items which the ALJ is required to consider without the IO submitting them in evidence, the ALJ is not restricted from taking official notice of other information as long as the IO can demonstrate that the material is relevant and commonly known or accepted. IOs should use this mechanism whenever appropriate to further focus the ALJ's attention on areas of relevant interest, whether specified in regulation or not.
5. Guidelines For Reports Of Sexual Offenses And Harassment. As the marine industry has become more diversified, incidents of sexual abuse and harassment have grown. Congress, in 1989, enacted legislation that requires incidents of sexual abuse aboard U.S. documented vessels be reported to the Coast Guard. For incidents of sexual harassment there are no specific laws or regulation written that effect the marine community. The lack of specific laws and regulations should not dissuade IOs from investigating reports of sexual harassment made by mariners.
- a. Investigation. Reports of sexual abuse and harassment should be taken seriously and investigated immediately. When conducting investigations dealing with a sexual nature, IOs shall take care to

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- 2.D.5. a. (cont'd) ensure the victim does not suffer any further embarrassment. 46 U.S.C. 10104--Requirement to Report Sexual Offenses, requires a master, or other individual in charge, to report complaints of sexual offenses to the Coast Guard. Complaints may also be received from the victim, witness, or other law enforcement agencies. 18 U.S.C., Chapter 109A--Sexual Abuse, defines the sexual offenses which are required to be reported under 46 U.S.C. 10104. The offenses described in Chapter 109A are: aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact, and definitions.
- b. Action. If an investigation detects a violation described in 18 U.S.C. 109A has occurred, S&R proceedings shall be initiated against the individual who committed the act. The charge should be Violation of a Law or Regulation. Misconduct should not be used, as misconduct under 46 CFR, Table 5.569, carries only a 1-3 month suspension. To reflect the seriousness of an offense listed in the Sexual Abuse Act, the recommended sentencing guidelines for a conviction is, at a minimum, imprisonment for not less than 6 months, and/or up to a \$5000.00 fine. Accordingly, a requested sanction of revocation would be appropriate. S&R proceedings shall also be initiated against the master, or other individual in charge if the investigation also finds that these individuals failed to report the offense to the Coast Guard. A report of sexual abuse, made by any person, should be reported to an U.S. attorney, as the allegation constitutes a Federal crime. If an investigation finds that sexual harassment has occurred aboard a documented vessel, S&R proceedings shall be initiated against the person who committed the act. The basis for the charge of misconduct is 42 U.S.C. 2000e, and 29 CFR 1604.11, which prohibit sexual harassment in the workplace. If the investigation finds that the master knew the sexual harassment was on going, and took no action to stop it, the master should also be charged with misconduct for violating 42 U.S.C. 2000e and 29 CFR 1604.11 (see 2.D.6.d).
- c. Failure To Report A Sexual Offense. 46 U.S.C. 10104(b) authorizes up to a \$5000.00 civil penalty against a master, or other individual in charge, who knowingly fails to report a complaint of sexual abuse to the Coast Guard. The IO shall open a Marine Violation (MV) case against the master, or other individual in charge, if the investigation finds that the master, or other individual in charge knew of the incident, and the complaint was made to the Coast Guard by the victim, witnesses, or other law enforcement agency.
6. Sample Charges And Specifications. In the following examples, the charges of misconduct, negligence, incompetence, violation of law or regulation, and dangerous drug offenses are explained and illustrated, and sample specifications are set forth. These examples are not inclusive of every situation that may be encountered; they are intended to illustrate the most common types of situations that have been encountered.
- a. Misconduct. Generally, a specification under a misconduct charge must, on its face, allege facts which fulfill the standards of 46 CFR 5.27. The words of the specification must allege on the face of the specification that what was done was wrongful. Thus, if the actions alleged could, on the face of the specification alone, be other than wrongful, the word "wrongfully" should be included. The following examples provide specifications alleging offenses which amount to misconduct.

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- 2.D.6. a. (1) Failure To Perform Duty/Failure To Perform Duty By Reason Of Intoxication. The offense of failing to perform duty is distinct from incompetence in that the former is a failure to perform, whereas the latter is inability to perform. A person may neglect a duty by never entering upon it; such is an omission of action, rather than an act. A duty may be imposed by law, regulation, or custom in effect at the time of the offense. To sustain a specification of failure to perform duty by reason of intoxication, it must be affirmatively proven that the intoxicated state of the respondent was directly or indirectly coupled with the person's failure to perform. When there is an intervening cause (confinement on the ship or other relief from duty) for failure to perform, the respondent should be charged with the offense(s) on which the relief from duty was based. If applicable, a separate specification should allege inability to perform duties due to intoxication, or other cause resulting from the misconduct. [NOTE: See Appeal Decision No. 1533.] Sample specifications:
- (a) ". . . Did, on or about July 1, 1995, while the vessel was at sea, wrongfully fail (or refuse) to perform your duties as watertender on the 1200-1600 watch."
  - (b) ". . . Did, on or about 0800, August 1, 1995, while the vessel was at London, England, wrongfully fail (or refuse) to report to work as a deck department day worker."
  - (c) ". . . Did, on or about April 1, 1995, while the vessel was at the port of Oslo, Norway, wrongfully fail (or refuse) to stand your 0400-0800 gangway watch by reason of intoxication (or by reason of being under the influence of liquor)."
  - (d) ". . . Did, on or about April 1, 1995, wrongfully fail to perform your duty as 1200 to 1600 lookout by sleeping in the forecandle head."
- (2) Disobedience Of A Lawful Command. The authority of the ship's master to issue orders is well established (see 46 U.S.C. 11501). A command need not be issued directly by the master, but may be transmitted by the master through subordinate officers. No statute permits a mariner, either expressly or implicitly, to disobey a lawful order of a superior; a mate or engineer as well as the master (certain statutory safeguards provide a remedy to mariners in cases of abuse). The relationship of master to mariner is entirely different from that of the employer and employee ashore. A mariner who questions a master's order does so at risk. The IO, of course, should decide if the command was legal and should not base charges on an illegal command. The specification must tell what the command was and, unless obvious, the manner in which it was disobeyed. Sample specifications:
- (a) ". . . Did, on or about 1300, July 1, 1995, while the vessel was at sea, wrongfully disobey a lawful command of the master to take your regularly assigned lifeboat station, by failing to do so."
  - (b) ". . . Did, on or about 1300, August 1, 1995, while the vessel was at the Houston, Texas, City Dock, wrongfully

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- 2.D.6. a. (2) (b) (cont'd) disobey a lawful command of the chief engineer to change and clean fuel oil strainers on your watch, by failing to do so."
- (3) Assault/Assault And Battery. In the following examples, several types of assault or assault and battery have been set forth. Assault has been defined as an attempt to touch another without permission, or as a placing of another in fear of bodily harm. Battery is, then, a consummation of the first type of assault. Assault with dangerous weapon is a serious breach of safety; assaults by mariners on the master or other officers, whether or not resulting in injury, are grave offenses. Sample specifications:
- (a) ". . . Did, on or about April 1, 1995, while the vessel was at sea, wrongfully assault the master, Philo Pfarkley, by brandishing a 12-inch wrench in a threatening manner and offering to strike him."
- (b) ". . . Did, on or about 1 June 1995, while the vessel was at sea, wrongfully assault and batter a member of the crew, Frank Jones, by beating him with your fists."
- (c) ". . . Did, on or about July 1, 1995, while the vessel was at sea, wrongfully assault a member of the crew, Frank Jones, by threatening him with a 9mm pistol."
- (4) Desertion. This is the abandonment of a ship in which a mariner has engaged to perform a voyage, before the expiration of the mariner's contract and without leave. In maritime law, desertion means not merely an unauthorized absence from the ship without leave, but unauthorized absence with no intention of returning to its service. Intent, being a state of mind, is not open to direct proof but must be inferred from other facts. Thus, to sustain an offense of desertion, proof of the permanent absence from the vessel is essential to distinguish desertion from failure to join. Removal of all personal effects may indicate the intent to permanently abandon. However, the leaving of any of a mariner's effects aboard the mariner's vessel does not necessarily rebut an indicated intent not to return. An individual may desert whether or not the mariner takes his or her personal effects, and removing personal effects does not always establish desertion. There are many other ways of proving intent (e.g., statements, how long the individual was gone, and where the mariner went). In the case of desertion, 46 U.S.C. 11501 provides for the "forfeiture of all or any part of the clothes or effects [which the deserter] leaves on board." (Obviously, if Congress had intended that desertion would not have occurred if clothes or effects were left on board, there would not be a provision for the forfeiture of such effects.) Sample specification:
- (a) ". . . Did, on or about April 1, 1995, wrongfully desert the vessel, at London, England."
- (5) Theft And Robbery. Theft (larceny) is the taking and carrying away of another's property with intent to permanently deprive. Robbery is the taking of property by force or putting in fear, from the person or presence of another. Wrongful possession of another's property is also misconduct. Sample specifications:

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- 2.D.6. a. (5) (a) "... Did, on or about June 1, 1995, while the vessel was at Liverpool, England, wrongfully have in your possession certain stores of said vessel, to wit. . ."
- (b) "... Did, on or about April 1, 1995, while the vessel was at sea, wrongfully take, and carry away, personal property of another member of the crew, Dick Jones, to wit: a radio, watch, and two rings."
- (c) "... Did, on or about March 1, 1995, while the vessel was at sea, rob another member of the crew, John Sebastiani, of his wallet."
- (6) Failure To Account. The Coast Guard considers that a person serving on a ship who receives money from others and fails to make a proper accounting for it at the prescribed time continues to act under the authority of his or her MMCs, to the extent that the person may be charged with this offense after completion of the voyage. Sample specification:
- (a) "... Did, on or after a voyage which extended between April 1, 1995, and July 1, 1995, wrongfully fail to make a proper accounting to Elizabeth Smith, a passenger lawfully entitled thereto, for certain funds which you collected in the performance of your duties as purser during the course of said voyage."
- (7) Possession Of Alcoholic Beverages. The possession of alcoholic beverages aboard commercial vessels is not expressly prohibited by law or regulation, except in certain instances as specified in 33 CFR 95.045. However, a vessel owner or master may prohibit such possession or use, either verbally, by written order, or through an employment contract with crewmembers (Shipping Articles, Form CG-705A, specifically warns crewmembers against having or bringing aboard "grog," i.e., any intoxicating beverage). Sample specifications:
- (a) "... Did, on or about April 1, 1995, while the vessel was at New York, N.Y., wrongfully bring liquor aboard (or cause liquor to be brought aboard)."
- (b) "... Did, on or about June 1, 1995, while the vessel was at sea, wrongfully have intoxicating beverages in your possession."
- (8) Possession, Use, Sale, Or Import Of Narcotics. The Comprehensive Drug Abuse Prevention and Control Act of 1970 prohibits most activities involving narcotics (including opiates and cocaine) and marijuana. 21 U.S.C. 841 prohibits unauthorized manufacture, distribution, dispensing, or possession with intent to do any of the above, of controlled substances (including narcotics and marijuana). 21 U.S.C. 952 prohibits importation of controlled substances without a permit, or except in accordance with regulations as the Attorney General shall prescribe. 21 U.S.C. 955 prohibits possession of narcotics and marijuana when arriving or departing the United States unless listed on the manifest. 21 U.S.C. 957 prohibits import of controlled substances by anyone not registered to do so. 21 U.S.C. 802 defines "controlled substance," "marijuana,"

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2.D.6. a. (8) (cont'd) and "narcotic drug." 21 U.S.C. 812 lists controlled substances, dividing them into five schedules. The complete schedules are listed in 21 CFR 1308. Marijuana, THC, and heroin are in Schedule I; cocaine is in Schedule II. In view of these comprehensive provisions, particularly 21 U.S.C. 844, possession of narcotics or marijuana is presumed to be wrongful in the absence of evidence to the contrary. Possession, use, and any kind of dealing with narcotics or marijuana by U.S. merchant mariners is considered among the most serious offenses within the jurisdiction of the Coast Guard, and those for which S&R actions are usually required. 46 U.S.C. 7704 requires revocation of the MMCs, if within 10 years before the beginning of the proceeding a mariner is convicted of violating a dangerous drug law of the United States or of a state. CDOA 2535, (SWEENEY) defines cure as it applies to cases involving dangerous drugs. Dangerous drugs is defined to include marijuana for this purpose. Although that CDOA was subsequently reversed by the NTSB, the action of the NTSB was done for reasons unrelated to the definition of cure. 46 U.S.C. 7704 requires revocation of the MMCs if the holder has been a user of, or addicted to, a dangerous drug, unless satisfactory proof of cure is made to the ALJ. In cases where the charge has been proved before an ALJ, the sanction of revocation shall be pursued by the IO. If the respondent presents evidence of cure and the ALJ finds the person cured, than any sanction less than revocation will be determined by the ALJ. When a mariner is convicted of a narcotics offense that occurred while the mariner was employed on a U.S. vessel, the IO may proceed under either 46 U.S.C. 7703 or 7704. When a mariner is convicted of a dangerous drug offense that occurred while the mariner was not employed as a mariner on a U.S. vessel, the IO shall proceed under 46 U.S.C. 7704 (see subparagraph 2.D.6.e. below). Sample specifications:

- (a) ". . . Did, on or about April 1, 1995, while the vessel was at Galveston, TX, wrongfully have in your possession a narcotic drug, to wit: cocaine."
- (b) ". . . Did, on or about August 1, 1995, while the vessel was at New Orleans, LA, wrongfully sell and/or deliver to a crewmember, Tad Sludge, a quantity of certain narcotics, to wit: opium."
- (c) ". . . Did, on or about September 18, 1995, receive a conviction from the State of Louisiana, for the sale and possession of opium while acting as a crewmember of the M/V SEA LION on August 1, 1995.

- (9) Failure To Respond To Summons Or Subpoena. The authority of the Coast Guard to compel the attendance of witnesses or the production of other evidence at an investigation or hearing is provided by 46 U.S.C. 7705. If a mariner serving under authority of his or her MMCs is subpoenaed to appear as a witness or produce evidence, and fails to appear, S&R proceedings may be initiated. [NOTE: A subpoena for the purpose of serving a Decision and Order (D&O), or of obtaining surrender of a credential which has been ordered suspended or revoked, is not lawful and does not serve as a basis for this specification.] Sample specification:

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2.D.6. a. (9) (a) "... Did, on or about October 1, 1995, while the vessel was at New Orleans, LA, wrongfully fail to appear as a witness as directed in a subpoena dated March 31, 1995, duly issued and served by Ensign Frank Benson, Investigating Officer."

(10) Harassment Of Passengers. This is a most serious offense. It has long been held that passengers on vessels are entitled to protection from invasion of their privacy and from personal rudeness (see Chamberlain v. Chandler [1823], Fed Cas 2575, and Nieto v. Clark [1858], Fed Cas 10,262). Because of the serious nature of these types of offenses, evidence to support such allegations must be clear and convincing. However, the IO may encounter great difficulty in preferring such charges. In cases involving minors, parents are reluctant to permit them to appear as witnesses or to be interrogated. Also, when these situations arise on the outbound voyage, passengers debarking in foreign ports can submit their testimony only by deposition. Several cases on appeal (see COMDTINST M16722.3 (Series), Index of Commandant's Decisions on Appeal and Review of Suspension and Revocation Proceedings, section 6.251) involve varying degrees of harassment, from wrongfully entering passengers' staterooms and addressing them with improper language to committing overt acts of physical contact. Where the act of physical contact is sexual in nature, the IO shall reference 2.D.6.d, as sexual abuse or contact is a violation of law. IOs should familiarize themselves with the cases reported in COMDTINST M16722.3 (Series), for comparison with the evidence available in cases which may arise. Sample specification:

(a) "... Did, on or about May 1, 1995, while the vessel was at Hamilton, Bermuda, wrongfully enter the stateroom of a female passenger, Marilyn Closett, and address her in improper language."

(11) Sexual Harassment. Congress has enacted several laws to protect workers from intimidating, hostile and offensive work places, and the marine work place is not exempt from these laws. Marine employers shall follow the rules established by the Equal Employment Opportunity Commission (EEOC) to protect workers from such an environment. Complaints made by mariners should be investigated promptly and tactfully. IOs should advise victims unless a witness, or other proof can be found to verify that words or gestures occurred, a case may be hard to prove. If the investigation finds the master of the vessel failed to stop the behavior of the offending person, S&R proceedings shall be initiated (see 2.D.6.d). Sample specifications:

(a) "... Did, on or about Aug 4, 1995, while the vessel was off loading cargo, wrongfully made sexual gestures towards Seaman Wendy Bronson, making for an offensive work environment, and causing her to leave her station as a line handler."

(b) "... Did, on or about March 15, 1995, while the vessel was underway, wrongfully use your position as watch supervisor, by telling AB Adam West, that if he wanted to have preferred duties, he should leave his stateroom door unlocked for your "payback" visits."



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- 2.D.6. a. (11) (c) ". . . Did, on or about Aug 4, 1995, as Master of the M/V SEA LION, while the vessel was moored at Pier 24, Port of Chicago, failed to act upon the complaint of sexual harassment made by Seaman Bronson against 3rd mate Kelly during cargo operations.
- (12) Improper Treatment Of Crew. Maltreatment of crewmembers by the master and officers, and the abandonment of mariners in a foreign port, are offenses punishable by fine or imprisonment. To constitute an offense under criminal statutes, maltreatment must be cruel and unusual punishment, induced by malice or hatred; the abandonment of a mariner in a foreign port must be done maliciously and without justifiable cause. The "borderline" in determining maltreatment is a fine distinction between extreme and unjustifiable acts and the authority under 46 U.S.C. 11501 of the master to punish mariners for disobedience or continued disobedience of lawful orders. For example, the holding in irons of a mariner for continued refusal to bring coffee to the chief mate was held to be cruel and unusual punishment predicated on an unlawful order. In other cases, where mariners were placed in irons for disobedience of a lawful order and punishment was temperately applied, no offense was committed. [NOTE: Abandonment of mariners in foreign ports, as defined by 18 U.S.C. 2195, rarely arises since removal of such persons overseas is generally based on bad conduct that justifies removal for the safety of the vessel. It is usually done through the U.S. consul or vice consul at the port of removal.] Sample specification:
- (a) ". . . Did, on or about June 1, 1995, while the vessel was at sea, wrongfully imprison a member of the crew, Bill Ding, by confining him in irons in the Number 2 lifeboat."
- (13) Smuggling Or Failure To Declare Dutiable Merchandise In Domestic Or Foreign Ports. The Coast Guard acts in conjunction with the U.S. Customs Service in the protection of revenue and prevention of smuggling activities; this is a deeply rooted mission, from the birth of the Revenue Cutter Service. As in the prohibition against the importation of dangerous drugs, smuggling statutes provide that possession shall be deemed evidence sufficient for a finding of guilty unless mitigating factors can be shown. These provisions include smuggling into the U.S. and other countries, and situations short of actual importation, where there has been an attempt or intent to evade payment of lawful duties. Charges under 46 U.S.C. Chapter 77 involving the illegal importation of merchandise, brought other than on complaint of a Customs officer, should be processed in cooperation with the Customs Service at the port where the offense occurred. Sample specification:
- (a) ". . . Did, on or about July 1, 1995, while the vessel was in San Diego, CA, wrongfully bring [attempt to bring] into the United States certain merchandise [articles, commodities] which could not lawfully enter the United States until certain formalities required by the U.S. Customs Service had been met, to wit: payment of tax or duty [declaration, invoice, or description of said merchandise [articles, commodities] on a manifest of ship's cargo, stores or crew curios.]"

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- 2.D.6. a. (14) Stowaways/Aiding Illegal Entry Of Aliens. Stowing away, or the aiding, assisting, or abetting of any person who stows away, on a U.S. vessel with the intent to obtain transportation is prohibited by 18 U.S.C. 2199. The bringing into the U.S., harboring, or concealing, or attempting to do so, on board any vessel, of any alien not duly admitted by an immigration officer or not lawfully entitled to enter or reside in the U.S. is prohibited by 8 U.S.C. 1324. A case may occur in which a person has been discovered to be on board a vessel illegally, and the person's residence status is undetermined at the time of the investigation. In another instance, a conviction for harboring or concealing an alien may have been obtained under 8 U.S.C. 1324, or criminal prosecution for one or more reasons has been undertaken by the U.S. attorney. In cases involving alien smuggling rings, evidence at the S&R proceedings must be supplied through the testimony of the immigration officer, or the master or other ship's officer, having direct knowledge of the offense, rather than relying on the disposition of the case by the federal district court. To provide sufficient flexibility in unclear cases, it will be necessary to prefer dual specifications (see samples (a) and (b) below). A situation may arise where a mariner aids a stowaway (other than an illegal alien) by furnishing food and a place of concealment, although there is no evidence to show that the mariner aided the stowaway to board the vessel. While this is not specifically covered in 8 U.S.C. 1324, it is considered misconduct equivalent to aiding the stowaway to board the vessel. Sample specifications:

- (a) ". . . Did, on or about April 1, 1995, while the vessel was at San Francisco, CA, bring in [attempt to bring in] to the United States, or conceal or harbor [attempt to conceal or harbor], an alien not duly admitted by an immigration officer or not lawfully entitled to enter the United States."
- (b) ". . . Did, on or about June 1, 1995, while the vessel was in Hong Kong, without the consent of the master or owner, with intent to obtain transportation there for, aid [abet, assist] to stow away aboard said vessel a person, Chang Duc Thi."
- (c) ". . . Did, on or about September 1, 1995, while the vessel was at Djakarta, Malaysia, wrongfully aid and assist a stowaway, Li Quing Dyk, illegally then and there on board, by furnishing him with food and shelter."

- (15) Failure To Join. In the majority of instances, proof can be established by introduction of the Shipping Articles showing the mariner's signature to sign on the vessel, and the corresponding entry by the master stating the mariner's absence at the end of the voyage or at the time the crew "pays off." This evidence should be supplemented by certified copies of relevant Official Logbook entries made in accordance with 46 U.S.C. 11502. Sample specification:

- (a) ". . . Did, on or about August 1, 1995, wrongfully fail to join the vessel at Wilmington, DE."

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- 2.D.6. a. (16) Absence Without Leave (AWOL) And Absence Over Leave (AOL). Although both of these constitute unauthorized absences, the former includes the element of unauthorized departure from the vessel. Consequently, if a mariner is charged with absence and evidence indicates that the mariner had authority to depart but did not return when due back, the specification should reflect AOL. No specific intent need be proved; the act supplies the intent. If a mariner on authorized leave is unable to return through no fault of his or her own, the mariner has not committed an offense. For example, if it is verified that the mariner's absence was solely due to the mariner's arrest and detention by civil authorities, followed by acquittal in a civil court, the mariner should be found not guilty of the specification; the same rule applies to an illness which prevents the mariner's return. However, when such absence is caused by misconduct for which the mariner is convicted in a civil court or there is evidence produced during the hearing for AOL, it does not provide a defense to the charge of unauthorized absence. Sample specifications:
- (a) ". . . Were, on or about April 1, 1995, wrongfully absent from your vessel without leave, within 24 hours of the vessel's sailing from London, England."
  - (b) ". . . Did, on or about April 12, 1995, wrongfully remain absent from your vessel beyond your authorized leave."
  - (c) ". . . Were, on or about April 12, 1995, while the vessel was at sea, wrongfully absent from your duties without authority."
- b. Negligence. 46 CFR 5.29 sets forth the definition of negligence. A watch officer who fails to post a lookout while the vessel is underway at night or under conditions of restricted visibility is negligent. A lookout who is not alert and fails to see an approaching vessel which is visible, and consequently fails to give warning to the bridge, is likewise guilty of negligence. Sample specifications:
- (1) ". . . Did, on or about January 11, 1995, while the vessel was approaching the Galveston, Texas, Sea Buoy, fail to adequately fix the position of the vessel, contributing to the grounding of the vessel."
  - (2) ". . . Did, on or about April 13, 1995, while the vessel was at sea, fall asleep while on lookout duty on the forecastle head."
  - (3) ". . . Did, on or about June 29, 1995, while the vessel was navigating on the high seas [in navigable waters of the United States], during conditions of restricted visibility, fail to obtain or properly use information available to you from radar observations to determine if a close quarters situation was developing and/or risk of collision existed from a vessel detected by radar."
- c. Incompetence. As indicated in 46 CFR 5.31, the charge of incompetence is based simply on inability on the part of a mariner to perform the duties required by virtue of the MMCs. The inability to perform may be due to professional deficiencies, physical disability,

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2.D.6. c. (cont'd) mental incapacity or due to drug or alcohol abuse (see 2.C.4. or 2.C.5.) It must be further verified that the disability continues to exist or may be presumed to exist at the time of the hearing. In each instance, the charge will simply be "incompetence"; the specification will set forth the appropriate facts. Professional deficiency is, generally speaking, shown by a course of actions over a period of time indicating that the mariner should not be allowed to continue to serve in his or her rating. In some cases, such as ignorance of the Navigation Rules resulting in a collision, it may be indicated by one incident. Sample specifications:

- (1) ". . . Did, on 15 February 1995 incorrectly plot the 2400 dead reckoning position for the vessel and was incompetent by his acts and omissions, while standing deck watches on a foreign voyage, which demonstrated that he did not possess and exercise the professional skills of an ordinary, prudent, licensed third mate on 15 February 1995."
- (2) ". . . Did, on or about January 19, 1995, February 1, 1995, and March 1, 1995, while the vessel was at sea, suffer from seizures and were thus unable to perform your duties as able seaman and at present are still susceptible to seizures."
- (3) ". . . Were, on or about January 14, 1995, February 1, 1995, and March 1, 1995, while the vessel was at sea, unable to perform your duties of able seaman due to your demonstrated irrational behavior and at present you suffer from mental illness."
- (4) ". . . Were, on or about 17 March 1995, found to be mentally incompetent by Dr. Smith, of the Jupiter Medical Center, for abuse of (alcohol)(name of drug)."

d. Violation Of Law Or Regulation. The IO's decision to use Violation of Law or Regulation, vice Misconduct or Negligence, should be based on the severity of the violation. Example, a master involved in a collision who failed to properly post a look out, as required by NavRule 5, can be charged with Violation of Law or Regulation, Misconduct, or Negligence. The IO should research applicable laws and regulations, and their intent with regards to promoting marine safety, and the protection of navigable waters. The IO must look at the facts involved in the casualty and decide which charge to use. Recent legislation, i.e., Oil Pollution Act of 1990, and the Sexual Abuse Act of 1986 have been codified in laws applicable to marine safety. Other laws such as the Civil Rights Act of 1964 (42 U.S.C. 2000e), although not codified in laws dealing with marine safety, exist and are applicable to promoting marine safety. The IO should also seek a comparable sanction, i.e., if the law requires imprisonment, revocation should be sought. The following specifications deal with acts that may not be codified in laws or regulation specifically dealing with marine safety, but are of growing concern within the marine industry:

- (1) Sexual Harassment. 42 U.S.C. 2000e and the regulations published in 29 CFR, Subtitle B, Chapter XIV--Equal Employment Opportunity Commission, Part 1604, Section 1604.11 deal specifically with sexual harassment. The tie to marine safety is made through the effects sexual harassment have on an individual. Sexual harassment creates an intimidating, hostile and offensive work environment, which effects a crewmember's

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- 2.D.6. d. (1) (cont'd) work performance. 42 U.S.C. 2000e requires that employers must ensure the work place is free from such behavior. If an investigation indicates a master was aware of a crewmember being sexually harassed, and no action was taken to stop it, charges shall be preferred. Sample specification:
- (a) ". . . As master, Did, on or about May 1, 1995, receive a report of sexual harassment; to wit: a report made by Ordinary Seaman Smith, that AB Brian Jackson made suggestive comments which were considered lewd and sexual in nature, and you failed to take action, which created a [hostile, intimidating, offensive] work environment, thus effecting the work performance of Seaman Smith, a violation of 29 CFR 1604.11, and 42 U.S.C. 2000e, Title VII.
- (2) Failure To Report A Sexual Offense. 46 U.S.C. 10104 requires the master, or person in charge, to report to the Coast Guard all complaints of sexual offenses which occur aboard U.S. documented vessels. The failure to report a sexual offense differs from failure to take action regarding sexual harassment. Sexual offenses, as described in the Sexual Abuse Act of 1986, (18 U.S.C., Chapter 109A), are far more serious than sexual harassment because physical contact is involved. The sentencing guidelines for sexual offenses are also more severe than sexual harassment. If an investigation indicates that the master, or person in charge, of a documented vessel fails to notify the Coast Guard of a complaint dealing with a sexual offense, S&R proceedings shall be initiated, and revocation sought. Sample specification:
- (a) ". . . Did, on or about May 1, 1995, receive a report of a sexual offense described in 18 U.S.C., Chapter 109 A; to wit: a report made by Ordinary Seaman Smith, that Bos'n Jabowski forced her to have sex by threatening her with bodily injury on May 1, 1995, and that you failed to report the incident to the Coast Guard, a violation of 46 U.S.C. 10104(a).
- (3) Sexual Abuse. The guidance for specific violations covered under the Sexual Abuse Act of 1986 are found in 18 U.S.C., Chapter 109A. Where as 46 U.S.C. 10104 requires the master, or person in charge, to report a complaint of a sexual offense, the person who commits the act must be charged with a violation of law, with the specification of sexual abuse under 18 U.S.C., Chapter 109A. This is a very serious offense, as the criminal penalties associated with the act are very severe. IOs shall be careful conducting investigations of cases involving sexual abuse due to the nature of the acts. Care shall be taken to ensure that the victim is not further harmed through improper questioning. Sexual offenses on documented vessels is a Federal crime under 18 U.S.C., Chapter 109A, and an U.S. attorney should be notified. In all cases of sexual abuse, revocation should be sought due to the serious nature of the acts. Sample specifications:
- (a) ". . . Did, on or about May 1, 1995, while the M/V SEA PRINCE was moored in Norfolk, VA., offered Seaman Smith brownies laced with LSD, and then had sex with Seaman Smith when she was in an impaired state, a violation of 18 U.S.C. 2241(b)(2)(B)."

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- 2.D.6. d. (3) (b) "... Did, on or about May 1, 1995, force Ordinary Seaman Smith, to have sex by threatening her with death; to wit: I'll kill you if you don't give me what I want", a violation of 18 U.S.C. 2242."
- (c) "... Did, on or about April 15, 1995, while the M/V SEA PRINCE was at sea, were found by the master to have molested a minor female passenger, [NAME OF PERSON], by placing your hand on her private parts in a lewd and lascivious manner, a violation of 18 U.S.C. 2243"
- (d) "... Did, on or about May 1, 1994, while the M/V SEA PRINCE was at sea, threaten to "bust" Seaman Smith's skull if she continued to fight off your attempts to fondle Seaman Smith's buttock and breasts, after Seaman Smith asked you to stop, a violation of 18 U.S.C. 2144(2)."
- (4) Possession Of A Dangerous Weapon Or Explosive Compound. The carrying or possession by any person of any dangerous weapon or explosive compound aboard a merchant vessel, without previously obtaining the permission of the owner or master of the vessel is prohibited by 18 U.S.C. 2277. The wearing of sheath knives aboard ship without the consent of the master is prohibited by 46 U.S.C. 11506. This prohibition is repeated on the Shipping Articles, of which the master must inform every mariner offering to serve aboard his or her vessel. Sample specifications:
- (a) "... Did, on or about April 1, 1995, while the vessel was at sea, have in your possession a dangerous weapon, to wit: a .32 caliber automatic pistol, without permission of the master, a violation of 18 U.S.C. 2277."
- (b) "... Did, on or about July 1, 1995, while the vessel was at sea, wrongfully have in your possession an explosive compound, to wit: nitroglycerine, without permission of the master, a violation of 18 U.S.C. 2277."
- (5) Possession Or Selling Of A Switchblade Knife. The possession or sale of a switchblade knife aboard a U.S. vessel, in any location, is prohibited by 15 U.S.C. 1243. In such cases, the fact that permission was improperly granted by the master is immaterial. Sample specifications:
- (a) "... Did, on or about October 1, 1995, while the vessel was at sea, wrongfully have in your possession a switchblade knife, a violation of 15 U.S.C. 1243."
- (b) "... Did, on or about November 1, 1995, while the vessel was at St. Thomas, V.I., wrongfully sell to John Pibbs, a fellow crewmember, a switchblade knife, a violation of 15 U.S.C. 1243."
- (6) "Use Of Alcoholic Beverages. The use of alcoholic beverages aboard commercial vessels is not expressly prohibited by law or regulation, except in certain instances as specified in 33 CFR 95. Sample specifications:

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- 2.D.6. d. (6) (a) ". . . Did, on or about August 1, 1995, while the vessel was at sea, wrongfully consume intoxicating beverages, to wit: approximately two cans of beer, while you were standing the 2400-0400 engineroom watch, a violation of 33 CFR 95.045."
- (b) ". . . Were, at or about 1700, 1 October 1995, while the vessel was at sea, wrongfully intoxicated as defined by 33 CFR 95.020, to wit: the alcohol concentration in your blood was determined by breath analysis to be .07 per cent, a violation of 33 CFR 95.045."
- (c) ". . . Were, at or about 2200, 25 December 1995, while the vessel was at sea, wrongfully intoxicated as defined by 33 CFR 95.020, to wit: your superiors observed that your (manner, disposition, speech, muscular movement, general appearance, or behavior, as appropriate) was apparently affected by the consumption of an intoxicant (specify intoxicant, if known), a violation of 33 CFR 95.045."
- (7) Damaging Vessel, Stores, Or Cargo. Willful damage to a vessel, its stores, or its cargo is prohibited under 46 U.S.C. 11501. Sample specifications:
- (a) ". . . Did, on or about April 1, 1995, while the vessel was at sea, willfully damage the Number 4 lifeboat davit with a cutting torch, a violation of 46 U.S.C. 11501."
- (8) Resisting Coast Guard Personnel In Performance Of Duty. The forcible assault, resisting, opposing, impeding, intimidation of, or interference with any federal officer (including Coast Guard marine safety personnel) engaged in performance of official duties is prohibited by 18 U.S.C. 111 and 2231. The use of deadly force or dangerous weapons in connection with these offenses carries additional heavy penalties. While such offenses occur infrequently, they interfere with law enforcement activities and shall be charged whenever they occur. Sample specification:
- (a) ". . . Did, on or about April 1, 1995, while the vessel was at Seattle, WA, wrongfully and forcibly [assault, oppose, impede, or intimidate] a U.S. Coast Guard officer, Lieutenant Samuel Griffin, during the performance of his official duties, a violation of 18 U.S.C. 111, by [details]."
- (9) Mutiny And Conspiracy To Commit Mutiny. The elements of inciting or conspiring to mutiny (18 U.S.C. 2192) and the act of mutiny (18 U.S.C. 2193) are many and varied, ranging from the refusal or neglect of duty to open rebellion or usurpation of the master's command. The offenses may occur while the vessel is in a harbor (foreign or domestic) or on the high seas. The Supreme Court has held that a rebellion by mariners against their officers on board a vessel anywhere within the admiralty jurisdiction of the United States is to be punished as mutiny. This cannot be changed by the court and cannot be held inapplicable, in determining the right of mariners to strike when their vessel is docked at a domestic port, especially since Congress refused to adopt proposed measures limiting the scope

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- 2.D.6. d. (9) (cont'd) the statute to vessels underway on the high seas of (Southern Steamship Co. v. NLRB, 62 S.Ct. 886, 316 U.S. 31 [1942]). In this case, it was held that, where strikers deliberately defied direct commands to make ready for departure, and undertook to impose their will upon the captain and officers, the strike constituted mutiny under 18 U.S.C. 2192 and 2193. It is the Commandant's policy to seek revocation of MMCs in cases of mutiny or conspiracy to commit mutiny (46 CFR 5.61). [NOTE: Preferment of these charges should be reserved for aggravated acts, attended by open revolt, usurpation of command, tumultuous rioting, conspiracy to commit such acts, and like offenses. Simple disobedience of orders should be treated as misconduct.] Sample specification:

(a) ". . . Did, on or about October 31, 1995, while the vessel was at Staten Island, NY, combine, conspire, or confederate with other members of the crew to make revolt or mutiny on board, a violation of 18 U.S.C. 2192."

- (10) Unlawful Killing Of Another On Board Documented Vessels. This specification is patterned after those for murder and manslaughter under 18 U.S.C. 1111 and 1112 respectively. It is the Commandant's position that the wrongful taking of human life on board ship or on shore, with or without malice, intentional or not, should result in revocation of MMCs. If a mariner kills another human while a shore, the charge should be misconduct. Sample specification:

(a) ". . . Did, on or about November 1, 1995, while the vessel was at sea [in foreign or domestic port], intentionally killed John Jones, a fellow crewmember, with a fire axe, while on board the M/V CHERVON STAR, a violation of 18 U.S.C. 1111."

- e. Dangerous Drug Offenses. Being a user of, or addicted to dangerous drugs and convictions for dangerous drug offenses may be charged under 46 U.S.C. 7704 regardless of whether the individual was serving under authority of his or her MMCs at the time.

- (1) Use Or Addiction To Dangerous Drugs. IOs shall seek revocation of MMCs if a chemical test administered under 33 CFR part 95 or 46 CFR part 16 indicates a mariner is a user of dangerous drugs (see 2.B.3.f.). Mariners suspected of use or addiction shall be charged in accordance with 46 CFR 5.35. Mariners should be given the opportunity to enter into a settlement agreement (see 2.C.12.) if he or she is willing to enter a rehabilitation program. If the positive chemical test was the result of post casualty testing the IO shall take the case before an ALJ. ALJs may stay the order of revocation pending the mariner's completion of a drug rehabilitation program. If a mariner commits an act of misconduct regarding possession, use, sale, or association involving marijuana, 46 CFR 5.59(a) allows the ALJ to grant a sanction less than revocation upon showing by the mariner that the possession, use, sale, or association was the result of experimentation and that the mariner has submitted proof at the hearing of rehabilitation. IOs shall not use a



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- 2.D.6. e. (1) (cont'd) misconduct charge if evidence of use is obtained by chemical tests administered under 46 CFR part 16 or 33 CFR part 95.
- (2) Conviction For A Dangerous Drug Law. Mariners found convicted of any Federal or State laws regarding dangerous drugs within 10 years before the beginning of the proceeding shall be charged in accordance with 46 CFR 5.35. Once charged the IO may offer the mariner an opportunity to accept a voluntary surrender in lieu of a hearing (see 2.C.11.). IOs shall request revocation as required by 46 U.S.C. 7704(b) as the appropriate sanction. IOs do not have discretion regarding the sanction imposed for convictions relating to wrongful possession, use, sale, or association with dangerous drugs. Occasionally, in the past, the Commandant has vacated orders of revocation for marijuana convictions which had been entered more than 3 years after the offense for which convicted where evidence of rehabilitation appeared in the record (see Appeal Decision 2303 (Hodgman) 2303 and 2338 (Fifer), aff'd sub. nom. Commandant v. Fifer, National Transportation Safety Board (NTSB) Order No. EM-111 (1984)). More recently, however, the Commandant (see Appeal Decision 2428 (Neat)) has determined that the suspension and revocation appeal process should no longer be used as a forum for granting or denying waivers requested by Appellants. The Commandant has allowed individuals whose MMCs were revoked or surrendered for convictions relating to wrongful simple possession or use to apply for new MMCs in less than 3 years set by 46 CFR 5.901.
- (3) Investigating Officer's Discretion. IOs may exercise discretion in preferring charges under 46 U.S.C. 7704(b) only for marijuana convictions. This is an important responsibility; such discretion is not granted the ALJ, who must revoke if he or she finds a charge proved for a dangerous drug law conviction. Of primary importance is the period of time between the date of conviction and the date of investigation for 46 U.S.C. 7704 action. Other cases involving marijuana where discretion is recommended are those which indicate possession of minimal amounts, first offense, or an indication of experimentation. Prior to preferment of charges, the IO shall take into account the intent of 46 U.S.C. 7704, the safety of life and property at sea and the prevention of illegal drug trafficking, and answer the following questions:
- (a) Is the marijuana conviction several years old?
  - (b) Did the marijuana conviction occur while the holder of MMCs rather than acting under the authority of his or her MMC?
  - (c) Did the marijuana offense involve simple possession (personal quantity) or one time use (experimentation) rather than trafficking?

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2.D.6. e. (3) (d) Is this the only narcotic related offense on the mariner's record?

(e) Is the mariner no longer involved with narcotics?

If the answers to these questions are yes, the IO should consider not bringing charges under 46 U.S.C. 7704. When no charge is made, the final disposition of the case shall be an investigator's Letter Of Warning. (\*\*NOTE\*\* This is the only time a Letter of Warning shall be used for other than minor offenses, see 2.C.2.). Details of the case shall be made in the PACA, and PANS product sets in MSIS. If charges are preferred, the IO shall place in the record (memo to file) the facts underlying that decision. This will facilitate the Commandant's review of the decision to bring charges in case of appeal. See Appeal Decisions 2208 (Rogers) and 2348 (Manley) and NTSB Order No. EM-85 in the Rogers case. The relevant facts (Q&A's above) may be placed in the record by the IO's unsworn statement, but if the respondent contests them by sworn testimony or other evidence, the IO should consider introducing evidence. Sample specifications:

- (a) ". . . In that you being the holder of captioned documents, were found to have failed a chemical test for dangerous drugs; to wit: COCAINE, as determined by analysis of a urine specimen you provided on July 1, 1994, at Jupiter Medical Center, 2210 Hospital Drive, Lompoc, CA., as required by Title 46 Code of Federal Regulations 16.210(a) - Pre-employment Testing Requirements, raising the presumption of use, established by Title 46 Code of Federal Regulations 16.201(b).
- (b) ". . . Were on September 1, 1991, convicted of possession of narcotics, to wit: heroin, by the U.S. District Court in Portland, OR."

### 7. Special Circumstances.

- a. Oil Pollution. Charges served in cases of oil pollution may fall under negligence or misconduct, according to the circumstances. Each case in which S&R proceedings are being considered must be reviewed by an IO. As in other S&R investigations, any course of action detailed in 46 CFR 5.105 is available. This is a discretionary decision of the IO, based on facts developed by investigation. Sample specifications:

- (1) [Negligence] ". . . Did, on or about 1 April 1995, fail to adequately supervise cargo loading operations of the Tank Barge XYZ347, which resulted in an overflow of oil into the XYZ River, a navigable water of the United States."
- (2) [Misconduct] ". . . Did, on or about 1 July 1995, while assigned as person in charge of cargo oil transfer, wrongfully absent yourself from the immediate vicinity of the vessel KRONENBOURG, which was discharging crude oil, and thus were not available to shut down cargo operations in a timely manner after the cargo hose burst, as a result of which oil entered the navigable waters of the United States."

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- 2.D.7. b. Cases Involving Pilots. The United States Court of Appeals for the Ninth Circuit decided that a state pilot, not required to hold a license under federal law, is not acting under the authority of the pilot's federal license, although it is required by the state before it will issue the state license. See Soriano v. U.S., 494 F. 2d 681 (9th Cir. 1974). The U.S. District Court for the Eastern District of Louisiana decided that former 46 U.S.C. 214 does not, by itself, authorize proceedings against federal licenses held by pilots acting under authority of state licenses. See Dietze v. Siler, 414 F.Supp. 1105, (E.D. La., 1976). The Commandant's policy is to follow the Soriano and Dietze decisions in all cases involving pilots acting under the authority of state commissions. This policy does not affect investigative procedures concerning casualties and civil violations involving state pilots. Pilots acting under authority of federal licenses are subject to investigation and charging under 46 U.S.C. Chapter 77 or civil penalty action, as appropriate. Pilots acting solely under the authority of a state license are subject to civil penalty action for violation of applicable statutes. Any evidence of criminal violation of federal statutes shall be referred to the local U.S. attorney. If a violation is within the jurisdiction of a state or locality, the evidence should be referred to the cognizant state or district attorney. See also Commandant's Decision on Review 17 (POWER).
8. Equal Access To Justice Act. Implementing regulations are contained in 49 CFR 6. See also paragraph 2.G.8 below. The Act provides for retroactive payment of attorney fees and certain defense costs to certain persons charged under 46 U.S.C. Chapter 77. To be eligible, the charges must have been dismissed, and the respondent must allege that the charge was not substantially justified and must certify that he or she meets qualifying requirements of the act. The ALJ hearing the S&R case will also rule on the fee claim; the IO for the case may be required to act as the "operating administration counsel" as defined in the Act and in 49 CFR 6. [NOTE: The burden of proving that the charge was "substantially justified" rests upon the Coast Guard. "Substantially justified" means reasonable or "having a basis in law and fact." In light of possible additional costs imposed by successful claims under the Equal Access to Justice Act, it is essential that IOs exercise careful judgment in preferring charges.] However, the mere fact that the respondent prevails at the hearing does not mean that the charges were not substantially justified. In all cases, the IO shall file a brief opposing the claim for fee. Failure to do so may result in a fee award because the claim is unopposed, even if the Coast Guard's action was "substantially justified." Questions should be discussed with the district commander (dl).

### E. Procedures Prior To Hearing.

1. Field Request For Mariner's Prior Record ("MERMARPER"). The IO may investigate prior disciplinary information on merchant mariners. This information is known as a "MERMARPER". MERMARPER records initiated prior to implementation of MINMOD (May 1992), are maintained in Commandant (G-MAO-1) on 3x5 index cards. A MERMARPER request to Commandant (G-MAO-1) should indicate the complete name of the subject, the birth date, the subject's correct MMD, license number, and social security number; requests concerning more than one individual at a time may be combined. Investigators need check the information available on MSIS, including Wanted and Locator lists as well as to contact Commandant (G-MAO-1) for a MERMARPER. MERMARPER requests may be made to Commandant (G-MAO-1) by telephone, MSIS mailbox or E-mail. The mariner's prior

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2.E.1. (cont'd) disciplinary record should be obtained through MSIS and from Commandant (G-MAO-1) prior to preferring charges, to determine whether:

- a. A violation of a probationary order is involved;
- b. An outstanding order is pending service;
- c. Recidivism is a factor in the current offense; or
- d. It should be considered as matters in aggravation (see paragraph 2.F.17 below).

The prior records will neither prove nor disprove the facts of the current offense, and shall not be used as the sole basis for preferring charges. If the current charges are proved in a hearing, however, the prior record will be introduced as a matters in aggravation.

2. Review Of Investigative Case Files. The IO presenting the case shall be thoroughly familiar with all of the available evidence. The IO shall ensure that all documentary evidence such as Shipping Articles and log entries have been properly extracted and certified.
3. Prehearing Interviews. The IO should attempt to anticipate the sequence of events in the hearing. The IO should interview witnesses beforehand to evaluate the information that they will give under oath. The names, addresses, and telephone numbers of potential witnesses who were not subpoenaed previously should be readily available. If, during the course of the hearing, testimony from such persons is necessary, the IO may request a continuance of the hearing and issuance of subpoenas from the ALJ (see paragraph 2.E.7 below).
4. Prehearing Conferences And Stipulations. 46 CFR 5.501(c) includes authority for ALJs to conduct prehearing conferences for the settlement or simplification of issues involved in a case with the consent of the IO and the respondent. This authority comports with the provisions of the Administrative Procedure Act, which specifically permits such proceedings (see 5 U.S.C. 556 (c)(6)). Accordingly, this regulatory change has rendered moot the holding of Appeal Decision 2166 (REGISTER), as it relates to prehearing conferences. In order to establish maximum flexibility in the conduct of such conferences, no fixed rules are established; however, the following guidelines have been provided to the ALJs and will normally apply:
  - a. Authority For Prehearing Conferences. It should be noted that prehearing conferences may be requested by the ALJ, IO, or respondent (see 46 CFR 5.501(c)), and that a conference cannot be held unless both the IO and the respondent or an authorized representative are present, either in person or via a telephone conference call (see 46 CFR 5.501(c)(1)). At the outset of the conference, the judge will normally advise the participants that the proceeding is being conducted in accordance with the provisions of 46 CFR 5.501(c), and that admissions or statements made at the conference are not admissible in evidence at a hearing for any reason (see 46 CFR 5.501(c)(2)). Although the conference may be informal, all remarks should be addressed to the Judge. He or she should permit reasonable discussion; however, when a subject is fully ventilated, the Judge will rule and move on.

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- 2.E.4. b. Discussions At Prehearing Conferences. Matters appropriate for discussion and agreement at the prehearing conference include, but are not limited to:
- (1) Stipulations of facts;
  - (2) Agreements to amend the pleadings;
  - (3) Requests for the issuance of subpoenas;
  - (4) Matters of which official notice may be taken; and
  - (5) Arrangements for the taking of depositions either written or videotaped. In the case of videotaped depositions, issues such as a common tape format should be settled. Also, details for the presentation of telephonic testimony at the hearing itself should be arranged.
- c. Record Of Prehearing Conference. A conference report consisting of a list of the parties noting their appearances, agreements reached, the Judge's rulings, and other matters decided upon will be prepared by the Judge and served on all persons who entered appearances. The ALJ in his or her opening statement at the initial session of the hearing will enter into the record, the time, date, place, and persons present at the prehearing conference (see 46 CFR 5.501(c)(3)).
- d. Stipulation Of Facts. Agreements to stipulate certain facts in issue at the prehearing conference are proper and a well recognized method of expedition in administrative procedures. Should the parties agree to stipulate facts or amend the pleadings, either may introduce the stipulation at the hearing which, upon the consent of the other will become a part of the hearing record (see 46 CFR 5.501(c)(4)).
- e. Prehearing Agreements. Cases arise where the parties concerned in an effort to save time and serve the best interests of all concerned, agree to stipulate the facts of an alleged offense in exchange for a recommended sanction. The Commandant has approved this procedure, provided no assertion is made during the hearing that is inconsistent with such stipulation and recommendation, and the agreement is reduced to writing and signed by all parties thereto. (See Appeal Decision 1671 (DURDEN)). To avoid the possible perception of a "rubber stamp" hearing, the record of proceedings in such cases must reflect in crystal clear terms that the ALJ is authorized to accept or reject such recommendation at his or her discretion.
5. Organization Of Evidence. The IO must prove to the ALJ, by substantial evidence of a reliable and probative nature, that the allegations made against the mariner are true. Prior to the hearing, the IO should prepare the evidence in chronological order. It is helpful to prepare a list of questions for each witness. IOs are reminded that there is no substitute for adequate planning and careful preparation of a case.
6. Notification To Other Agencies. Often the subject matter of a hearing will be of interest to other agencies, such as the Federal Communications Commission (FCC), the Immigration and Naturalization Service (INS), the FBI, or local law enforcement agencies. As appropriate, local representatives of these interests should be advised of the time and place of such hearings.

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2.E.7. Issuance Of Subpoenas. At any time prior to the hearing, the IO may issue subpoenas to secure the attendance of witnesses or the production of books, papers, and other relevant evidence that may be needed by the IO or by the person charged. During the hearing, the ALJ may issue subpoenas for such purposes upon the ALJ's own motion, or upon request of the IO or the respondent.

8. Withdrawal Of Charges Prior To Hearing. Occasionally, an IO may want to withdraw charges prior to the convening of a hearing: a last minute voluntary deposit or voluntary surrender agreement may be completed, additional evidence may indicate that the charges are unwarranted, or it may be determined that charges were not properly served in accordance with 46 CFR 5.107. If a copy of a charge sheet has been forwarded to the ALJ, the IO must advise the ALJ in writing, with a copy to the respondent, that the charges are being withdrawn; a hearing should not be convened for this purpose. [NOTE: It is important to distinguish withdrawal of charges for such reasons from dismissal of charges, with and without prejudice.]

### F. Hearing Process.

1. Decorum. The Commandant has long stressed the remedial nature of the hearing; thus, a balance of dignity and informality is desirable. Coast Guard personnel shall be attired in the uniform of the day and shall conduct themselves in an appropriate manner at all times. The ALJ may announce any special instructions for the hearing. The OCMI should take particular care that hearing rooms are appropriate for the particular case, preserving the dignity of the hearing. A hearing cannot properly be convened in an office with persons crossing through and telephones ringing continuously. There must be sufficient room for the ALJ, IO, and the respondent and counsel. Cases having significant public interest should be heard in spaces adequate to accommodate spectators and media representatives. Where at all possible, hearing rooms located at field units shall be arranged to meet these requirements. [NOTE: Facilities maintained by other agencies may be used at the discretion of the OCMI.]

### 2. Convening Of The Hearing.

a. Court Reporters. The Chief Administrative Law Judge office is responsible for funding court reporting, and for funding the preparation of an original and one copy of a case transcript if requested by the Commandant for review under 46 CFR Subpart K. Transcripts will be forwarded to Commandant (G-MAO-1) via the ALJ. On rare occasions (i.e., extremely complex cases or when it becomes necessary for a different ALJ to assume a hearing in progress), the ALJ may also request a transcript prior to the issuance of the D&O. Requests for transcripts by respondents, or others when authorized by the ALJ, should be handled per 46 CFR 5.701(d). Since transcripts are not normally prepared until an appeal is received, arrangements should be made with the reporter so that the transcripts can be reproduced up to 60 days following the delivery of the ALJ's D&O. [NOTE: Several appeal cases have been overturned simply because a proper transcript could not be produced.]

b. Hearings In Absentia (46 CFR 5.515). Whenever a respondent, after being duly served with notice of the time and place of a hearing and the charges and specifications, fails to appear, the hearing may be conducted in absentia; a notation to that effect shall be made in the record. The ALJ shall then order into the record all facts concerning the issuance and service of the charge sheet

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- 2.F.2. b. (cont'd) (see section 2.D above). The IO (or other witnesses in the case of service by certified mail) who served the charge sheet shall testify under oath regarding this service, including the recitation of rights to the mariner.
- c. Time And Place Of Hearing (Venue). The hearing shall be held at the time and place specified on the charge sheet served upon the mariner.
- d. Change Of Venue Or Time. Once charges have been served, a request to move the hearing to any place other than that specified on the charge sheet or to change the time or date must be made to the ALJ initially convening the hearing. The ALJ will consider the nature of the request and the stated reason(s) for it; unless a change is ordered by the ALJ, the hearing will be held as scheduled. When a mariner requests a change of venue directly from the IO, the mariner shall be directed to contact the ALJ at the address and telephone number provided by the IO.
3. Production Of MMCs. Since charges may be brought against all MMCs issued to the mariner, the respondent must understand the requirement to bring all of his or her MMCs to the hearing. Failure to produce them will delay the orderly procedure of the hearing. [NOTE: An officer may be licensed for deck and engineering duty.] For the record, the respondent shall be asked whether he or she has produced all MMCs which have been issued to him or her. Outstanding MMCs shall be produced prior to conclusion of the hearing or otherwise accounted for.
4. Charges And Specifications.
- a. Dismissal. If, at any point during the hearing, the IO determines that he or she has incorrectly charged a person or that a charge or specification has no basis, the IO shall move to dismiss the charge/specification, with or without prejudice. Dismissal with prejudice means that the respondent may not be charged again for that offense; dismissal without prejudice means that the respondent may be charged again for that offense at a later date. If the IO determines that a chargeable offense was committed, but the charge sheet was incorrectly drafted or served, the IO should request dismissal without prejudice and serve a new charge sheet.
- b. Amendment. The ALJ may, on his or her own motion or the motion of the IO or respondent, permit the amendment of charges and specifications to correct minor errors by deletion or substitution of words or figures, provided that a legally sufficient specification remains. When errors of substance are found in charges or specifications, the ALJ shall order the defective charge or specification dismissed with or without prejudice. The IO may then prepare and serve a new charge/specification on the respondent, if appropriate.
5. Answer. The ALJ shall read each charge and specification to the respondent and seek from the respondent or the respondent's counsel a definite answer to each in accordance with 46 CFR 5.527. If the respondent refuses to make a definite answer, the ALJ shall enter an answer of "denial" and proceed with the hearing. If the respondent fails to appear without valid prior notice, the judge may declare the hearing convened in absentia and proceed (see subparagraph 2.F.2.b above), entering answers of "denial" to all charges and specifications.

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### 2.F.6. Opening Statements.

- a. By The IO If the respondent denies the charge, the IO shall make a statement outlining the matters expected to be proved, including relevant details that were not included in the specifications. The IO should explain his or her theory of the case, the elements of the offense, and the evidence which will prove each element. If the respondent admits or answers "no contest," the opening statement need only summarize the evidence upon which the charges and specifications are based. See 46 CFR 5.529.
  - b. By/On Behalf Of The Respondent. The respondent or the respondent's counsel shall have an opportunity to state the respondent's side of the case; this opportunity may be waived or deferred. If the respondent answers "admit" or "no contest," the respondent may present evidence or make a statement regarding mitigating circumstances which he or she believes to be material. Should this evidence or statement be inconsistent with an answer of "admit" or "no contest," the ALJ must reject the answer, change it to "denial" and proceed with the hearing.
7. Introduction Of Evidence. See also Chapter 1 of this volume for a discussion of evidence.
- a. Official Marine Records.

- (1) Shipping Articles, Form CG-705A, 735T, Or Equivalent. These constitute the contractual agreement between the master and members of the crew; 46 U.S.C. 10302 sets forth the particulars to be included for foreign or intercoastal voyages. (See NVIC 1-86.) When the vessel will be making a foreign voyage, they are referred to as "foreign" articles; when the vessel is engaged on a coastwise voyage, they are called "coastwise" articles. Shipping Articles or properly authenticated extracts, made on Form CG-2639H, are admissible as evidence in S&R proceedings.
- (2) Official Logbooks. Under 46 U.S.C. 11301, vessels making foreign and intercoastal voyages are required to have an "Official Logbook" and to make certain entries in them. Logbook entries may be introduced in hearings. Those concerning offenses listed in 46 U.S.C. 11501 and made in accordance with 46 U.S.C. 11502 may constitute prima facie evidence of the facts they recite. Official logbook entries concerning offenses which are not enumerated in 46 U.S.C. 11501 do not constitute prima facie evidence. Nevertheless, they are admissible under 46 CFR 5.545(b) as business entries. Extracts of logbooks should be made by photocopying or other similar means when entries are readily legible. When they are not, a typewritten extract shall be made. [NOTE: If logbook entries are relied upon to prove a specification, they should be examined carefully to ensure that they recite sufficient facts to prove all matters alleged. The bare conclusion, even in a logbook, that the mariner committed a certain offense, is not sufficient.] Photocopies shall be certified on the reverse side as in the following example: "I hereby certify that I have seen the original logbook and that the obverse of this sheet is true and correct copy of page 47, book I, the Official Logbook of the M/V SEALAND TRADER, for the voyage commencing February 1, 1994 [dated and signed by the IO, including rank and duty station]."



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- 2.F.7. a. (2) (cont'd) When the extracts are typewritten, only those entries pertinent to the case need be extracted. They shall be certified as in the following example: "I hereby certify that I have examined the Official Logbook, compared the above extract with it, and found it to be a true and correct copy of all entries pertaining to Joe Doakes on page 17, book II of the Official Logbook of the (vessel name) for the voyage commencing June 31, 1995 [dated and signed by the IO, including rank and duty station]."
- (3) Other Logbooks. The regulations now clarify that any logbook kept on the vessel may be admitted in evidence. See 46 CFR 5.545(b). Accordingly, deck logs, weather logs, and engineroom logs may be introduced as an exception to the hearsay rule, under the Federal Rules of Evidence, as a record of a regularly conducted activity.
- b. Depositions. A deposition is the recording and transcribing of testimony under oath of a person who is not present at the hearing. Depositions are generally required because the witness is located beyond the range of a subpoena to require the witness to attend the hearing. A deposition taken under oath and bearing the signature of the deponent is admissible in a proceeding. This testimony is generally taken through oral examinations similar to those employed at the hearing. It may also be videotaped or taken via telephone conference call (see 46 CFR 5.553). For simplification, where only specific answers are required, prepared questions and cross-questions from the respondent are approved by the ALJ, read to the deponent and answered, and returned to the judge, who will admit them subject to the rules of evidence. These are called interrogatories or cross-interrogatories. Live testimony via telephone may be the preferred alternative to a deposition. See paragraph 2.F.9 below. Assistance in preparing for a deposition may be obtained from the district commander (dl).
- (1) Who May Take Depositions. Within the U.S., or a territory or insular possession subject to the dominion of the U.S., depositions may be taken before any officer authorized to administer oaths. Within the Coast Guard, this includes commissioned and warrant officers and those persons specifically engaged in the performance of duties under 46 U.S.C. Chapter 77. Outside the Coast Guard, depositions may be taken before any person authorized by law to administer oaths, such as a judge, magistrate, commissioner, clerk of court, notary public, or judge advocate of an armed service. Within a foreign country, a deposition may be taken before any officer of that nation's government (unless prohibited by that nation's laws) or a U.S. consular officer. Any party may submit written interrogatories to be asked of an absent witness; the opposing party may also do so within a reasonable period of time (these are called cross-interrogatories). After the ALJ has reviewed the interrogatories from both parties (if any) the ALJ may ask additional questions to clarify the testimony. Both parties may submit cross-interrogatories to the ALJ's questions, and should state in writing the intent to waive that right, if they elect to do so.
- (2) Requests For Depositions. 46 CFR 5.553 provides that testimony may be taken by deposition upon application by either party or order of the ALJ. The IO, respondent, or counsel desiring the

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- 2.F.7. b. (2) (cont'd) deposition shall submit to the ALJ a prompt written application that includes the elements contained in 46 CFR 5.553. This provides the respondent with reasonable notice and opportunity to be present or to file interrogatories and cross- interrogatories, if desired. If the application is granted, the ALJ will serve a notice that names the deponent, the time and place of the deposition, and the officer before whom the deposition is to be taken. See Figure 2-3 for a sample notice to take deposition.
- (3) Procedure. Upon determining that good cause appears therefore, the ALJ enters an order designating the person before whom the deposition is to be taken, together with such other information, directions and orders as will enable the person so designated to obtain the deponent's testimony. His order and a list of interrogatories and cross- interrogatories, if any, are forwarded to the person designated to take the deposition. The ALJ also issues subpoenas for the witnesses sought to be deposed. It should be noted that an ALJ's subpoena authority is coextensive with that of a district court of the United States, in civil matters, for the district in which the proceeding is conducted. See 46 U.S.C. 7705, 46 U.S.C. 6304, and 46 CFR 5.301. The person designated to preside at the deposition shall have the subpoenas served upon the witnesses. The person presiding over the deposition shall place the witness under oath and proceed. The testimony shall be taken stenographically and transcribed at Coast Guard expense unless the parties agree to record the evidence by other means. See subparagraph 2.F.7.c below concerning videotaped depositions.
- (4) Objections. All objections made at the time to the qualifications of the presiding officer or the manner of taking the deposition, to the evidence presented, or to the conduct of any party or any other aspect of the proceedings, shall be noted by the presiding officer. These will be ruled upon by the ALJ upon resumption of the hearing.
- (5) Changes In Testimony. When the testimony is fully recorded, the interrogatories or deposition shall be submitted to the deponent for review (if necessary, it shall be read to the deponent). Any changes in substance which the witness desires to make shall be entered by the presiding officer, with a notation of the witness' reasons for making them. The interrogatories or deposition shall then be signed by the witness. If the witness refuses or otherwise fails to sign, this fact and the reason therefor shall be noted by the presiding officer.
- (6) Returns. The return of depositions shall be in accordance with 46 CFR 5.553.
- c. Videotaped Depositions. 46 CFR 5.553 authorizes testimony at a deposition hearing to be recorded on videotape for subsequent presentation at an S&R hearing. Visual observation of a witnesses demeanor can assist the ALJ in making credibility evaluations. Applications procedures are the same as for a "regular" deposition. Videotaping expenses are to be borne by the party requesting the recording. Testimony may be taken through oral examination or by interrogatories. The person requesting the videotape deposition is responsible for procuring appropriate equipment for playback at the hearing. The IO should verify this to ensure that delays, or worse, do not result from the attempted use of incompatible equipment.

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- 2.F.7. d. "Depositions" Under 46 CFR 4.12. The "deposition" referred to in 46 CFR 4.12 is not a true deposition because it is not cloaked with the authority of an ALJ. Rather, it is intended to provide the marine board or IO the testimony of a witness who will not voluntarily appear and who is beyond subpoena range. This type of "deposition" can be obtained through running oral examination or by use of interrogatories. As part of the investigation record, its quality is not as great as would be the witness' personal appearance and testimony.

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FIGURE 2-3

### SAMPLE NOTICE TO TAKE DEPOSITION

In the matter of License/Certificate of Service/Merchant Mariner's  
Document No. ####, Issued to Sammy Nebraska

Sir:

Please take notice that Howard Goon and Steve Edoar, witnesses called by Sammy Nebraska in the above entitled matter, whose testimony is necessary in the cause and who are located at the Seamen's Relief House, and who will be examined pursuant to the provisions of Title 46, Sec. 5.553, Code of Federal Regulations, before (persons name), USCG, or before some other officer authorized by Law to take depositions, at the U.S. Coast Guard Marine Safety Office, City of Kalamazoo, MI, at 10:00 am, January 23, 1995, at which time and place you are hereby notified to be present and interrogate said witnesses, if you so desire.

Dated at Kalamazoo, MI, the 19th day of January 1995.

Sincerely,

\_\_\_\_\_  
Administrative Law Judge  
U.S. Coast Guard

Copy: [Counsel for respondent]  
[Respondent]

- 
8. Prima Facie Evidence. Prima facie evidence is that which is sufficient on its face to establish a fact as alleged. For example, an official logbook entry made in substantial compliance with 46 U.S.C. 11502 will establish, prima facie, the facts it contains (see 46 CFR 5.545). A prima facie case, by contrast, is a collection of evidence which is sufficient for a finding that a specification is proved. However, it is subject to rebuttal by the defense, after which the ALJ must decide whether to believe all the evidence of the prima facie case. An official logbook entry does not establish a prima facie case unless it contains every element of the specification. An IO has the burden of proving the case by a preponderance of the evidence. See Appeal Decision 2472 (GARDNER).
9. Examination Of Witnesses. Testimony at hearing sessions may be received from witnesses actually present or telephonically from witnesses whose

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2.F.9. (cont'd) attendance is not available. Telephonic testimony is authorized by 46 CFR 5.535(f) and ALJs have been encouraged to use this means to assist in achieving financial savings and judicial efficiency. The specifics should be resolved via a prehearing conference or at a hearing session prior to the call being initiated. Experience has shown this means to be effective for "routine" testimony from distant witnesses including those aboard vessels equipped for voice communications via satellite. Telephone testimony becomes more complicated when complex legal issues and/or exhibits are involved. The following examination procedures apply whether witnesses are present or their testimony is taken via telephone.

- a. Preliminary Examination. The IO has the burden of establishing a prima facie case by the introduction of testimony of witnesses and documentary evidence (such as excerpts from Official Logbooks). When issuing subpoenas for witnesses, the IO must consider the time necessary for direct and cross-examination, to conserve the time of all parties involved. For example, if the IO believes that the testimony of a single witness will consume most of a day, the IO should avoid summoning other witnesses for that day.
- b. Direct Examination. The IO must present evidence from witnesses through proper questioning; the IO will be aware of the testimony which can reasonably be expected from the Coast Guard's witnesses. It is helpful to have a prepared outline of the questions which the IO will ask of each witness. This enables the IO to review those questions in advance to ensure they are not legally objectionable. In questioning a witness, the IO must avoid "leading the witness"; that is, asking questions which suggest a desired answer. Before questioning a witness with respect to a document to be entered into evidence, the IO must "lay a foundation" by showing the document to the witness and asking if the witness recognizes it and, if so, what he or she recognizes it to be; the document is then submitted into evidence. If the document is admitted into evidence by the ALJ, the IO may thereupon question the witness with respect to it. If there is an objection, either to the form of a question or to an answer by the witness, the ALJ will afford an opportunity to both sides to argue on the validity or nonvalidity of the objections. All elements of each specification must be established through direct examination of witnesses and introduction of evidence.
- c. Cross-Examination. When the IO has completed questioning, the defense may cross-examine. The scope of cross-examination should be confined to matters brought up in the direct examination, although proper questions may be asked to impeach the credibility of the witness. As a practical matter, however, respondents (and non-professional counsel) frequently introduce matters not brought out in direct examination. Although this is technically improper, it may be allowed unless the issue becomes so clouded that the record is distorted or unnecessarily expanded. Leading questions are proper on cross-examination and may be employed freely, except for the purpose of eliciting new matter.
- d. Recross And Redirect Examination. After cross-examination, the IO may question the witness further on redirect examination; the respondent may then recross-examine. There is no limit to the number of times that either party has to examine a witness, although parties are generally satisfied with a brief redirect or recross-examination. However, ALJs may limit reexamination. In particular, redirect is often restricted to matters included in the preceding cross-examination.

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- 2.F.9. e. ALJ's Examination/Excusal Of The Witness. The ALJ may, at any time, question a witness to clarify the issue before the ALJ. It is suggested that the ALJ wait until both direct and cross-examination are completed. When both parties and the ALJ have concluded their examination, the witness should be excused. The witness shall be admonished not to discuss the testimony, or any matter of which he or she has become aware through the hearing, with anyone until the conclusion of the hearing or unless directed to do so by competent authority.
- f. Medical Evidence In Incompetency Cases. The testimony of a physician or clinical records may not be required in all hearings. When such evidence is necessary for the presentation of the Coast Guard's case, and is so ordered by the ALJ, the costs associated with the examination and production of records or testimony will be borne by the Coast Guard. The respondent may produce medical evidence in his or her own behalf, at his or her expense.
10. Continuances And Adjournments. For good cause the IO or the respondent may move to "continue" the hearing from day to day, or to adjourn the hearing to another date or location. In ruling on this motion, the ALJ must first consider the future availability of witnesses and the prompt dispatch of the vessel(s) involved. When such motions are made by the respondent, the IO should prepare to counter them if such an order would be detrimental to the Coast Guard's case. When a hearing is continued or adjourned, the ALJ will return all MMCs to the respondent upon demand, provided that a prima facie case has not been established that the respondent poses a definite danger to the safety of life or the vessel. The IO should file a motion for the ALJ to retain the MMCs in such a case.
11. Disposition Of MMCs During Continuance Of Drug Hearings. 46 U.S.C. 7704(c) requires that the MMCs of a mariner be revoked if it is shown that the holder has been a user of, or addicted to a dangerous drug, unless "the holder provides satisfactory proof that the holder is cured". The hearing may be continued when an individual has initiated the process of cure, but has not completely satisfied the specific requirements outlined in CDOA 2535 (SWEENEY).
- a. The disposition of a mariner's MMCs was specifically addressed in USA/USCG vs. MMD issued to David D. Clay, issued in Alameda, CA on 17 March 1992. In this case, it was resolved that since the Investigating Officer has presented a prima facie case of drug use, that the mariner in question would pose a danger to public health, interest or safety at sea. Based on that determination, it was inappropriate to allow the mariner to retain his MMD during the continuance, and the MMD was withheld in accordance with 46 CFR 5.521(b). This decision, reviewed under the provisions of 46 CFR 5.801, was affirmed by the Vice Commandant on 30 March 1992.
- b. In Suspension & Revocation hearings involving the charge of use of dangerous drugs, which are continued pending a determination of "cure", the Investigating Officer should argue against the return of the mariner's MMCs based on the fact that a mariner who uses dangerous drugs poses a danger to public health, interest or safety at sea.
- c. In accordance with 46 CFR 5.707(a), persons whose MMCs have been revoked as a result of dangerous drug use are not entitled to temporary MMCs while the revocation is being appealed. Similarly,

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- 2.F.11. c. (cont'd) persons who are seeking a continuance of a hearing in order to perfect "cure" should not be entitled to the use of their MMCs during the continuance. OCMI's shall immediately advise Commandant (G-MAO-1) of any request for issuance of temporary MMCs or return of MMCs during a continuance that does not conform to this policy.
12. Motion To Dismiss. The IO presents evidence first, then rest the case. At the conclusion of the IO's presentation, the respondent may move to have any or all of the charges and specifications dismissed, on the grounds that the evidence fails to establish a prima facie case against the respondent. This motion may be made orally during the hearing, or in writing. Usually, this argument is a summation of all of the evidence submitted by the IO with the conclusion that the evidence is insufficient to prove the charges and specifications; the IO may submit an oral or written rebuttal of this claim. The ALJ may deny or grant any or all such motions, or may reserve a decision until the defense has completed its case. In deciding on the motion, the ALJ will determine if there is any substantive evidence which properly and reasonably establishes all essential elements of the charge or specification in question. If substantive evidence of the charge or specification exists, the motion will be denied.
13. Actions By Respondent/Counsel. The respondent's case is presented in the same manner as is the Coast Guard's, except that the examination roles are reversed (the IO has the right of cross-examination). When the respondent is represented by an attorney, the ALJ will usually refrain from direct involvement in the presentation of the defense. In those cases where a respondent represents himself or herself, or is represented by someone who is not an attorney, the ALJ may interject during the hearing to ensure that all relevant facts within the witness' knowledge are presented. When the testimony of the last defense witness is completed, the ALJ will ask the respondent if he or she "rests"; if the answer is affirmative, no further testimony will be taken for the respondent.
14. Rebuttal. When the defense has rested, the ALJ will afford the IO an opportunity to present evidence to rebut the defense testimony. The IO should make full use of the rebuttal process to further strengthen the case or impeach the testimony of witnesses, including the respondent's. Care should be taken that this presentation is truly rebuttal evidence, not a reopening of the Coast Guard's case.
15. Closing Arguments. After all evidence has been presented, the parties may present oral or written argument in the following order:
- Opening summation by the IO;
  - Argument by the respondent or the respondent's counsel; and
  - Closing argument by the IO
16. Submittal Of Proposed Findings Of Fact, Briefs. The ALJ will afford the IO and the respondent the opportunity to submit (orally or in writing) proposed findings and conclusions, with supporting reasons, within an established period of time. Failure to comply within this time shall be regarded as a waiver of this right.
17. Arguments In Mitigation Or Aggravation. If yes, the ALJ renders a decision of "Proved," the IO may enter the mariner's record in mitigation or aggravation (see paragraph 2.E.1 above). Any prior civil penalty

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2.F.17. (cont'd) action and any final judgment of conviction in state or federal courts is entered at this point (see 46 CFR 5.565). In addition to obtaining a mariner's MERMARPER, the IO should also verify the mariner's civil penalty history in MSIS. The IO may also include a recommended order to the ALJ. In keeping with the Coast Guard's objectives, certain offenses should result in outright suspension or revocation of the MMCs. The IO's recommendation can be amplified by calling particulars of past offenses to the attention of the ALJ. For example, a finding of "Proved" in an assault and battery case may be argued to be aggravated because of the mariner's prior record of assault and battery, which demonstrates a tendency for repeated violence. The IO may also offer evidence of other matters in aggravation such as a pilot's disciplinary record with a state pilot commission. In accordance with 46 CFR 5.565, the IO may also enter as part of the individual's prior record, information concerning the following:

- a. Any final judgments of convictions in state or federal courts;
- b. Final agency action resulting in civil penalty or warnings being imposed against the respondent in proceedings administered by the Coast Guard under 33 CFR 1.07; and
- c. Any official commendatory information concerning the respondent of which the IO is aware.

### G. Post-Hearing Procedures.

1. Preparation Of File. At the conclusion of the hearing, or as soon thereafter as practicable, the ALJ will assemble the hearing report consisting of the Report of Hearing, Form CG-2639D, D&O, and Notification with Charge and Specification(s), Form CG-2639, in that order, and distribute copies as indicated on the Report of Hearing Form.
2. Reviewing The File. The OCMI copy of the hearing report shall be reviewed and filed at the field office. IOs and ALJs must give careful consideration to the additional routing of cases and records, so that district program managers receive all information to activities under their control (e.g., cases involving damage to aids to navigation should be brought to the attention of the district aids to navigation branch). IOs shall maintain close active liaison with ALJs to assist, as necessary, in assuring that D&O's are served and that orders for outright suspension or revocation are complied with. If attempts for service and/or, when applicable, surrender are unsuccessful, IOs shall add the mariner to the Locator List. When it becomes apparent the no appeal will be filed, or the time limit for appeal expires, ALJs will forward the hearing record to the IO per COMDTINST 5900.7 (series). Hearing records shall be maintained by Investigation Departments per COMDTINST M5212.12 (series), Paperwork Management Manual.
3. Notifying RECs And NMC4A Of Personnel Actions. When personnel action is taken for the following situations:
  - a. Letters of Warning;
  - b. Suspension;
  - c. Revocation;
  - d. Surrender; or

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### 2.G.3. e. Voluntary Deposits (involving incompetence)

The IO shall forward a memorandum/rapid draft which shall include a brief description surrounding the reason for (a) through (e) to the issuing REC with a copy to Director, National Maritime Center (NMC4A). It is imperative for the issuing REC to receive this data promptly to prevent the possible issuance of duplicate MMCs. When any mariner's MMCs is suspended, surrendered or revoked for any reason and not delivered into Coast Guard custody, this fact should also appear in the memorandum/rapid draft.

4. Deposit Of MMCs After Suspension. MMCs that have been ordered to be surrendered for periods of outright suspension shall be deposited with the cognizant OCMI. A receipt shall be issued to the mariner and the MMCs retained locally. The MMCs should be returned upon expiration of the suspension period by being picked up in person or by being sent by certified mail, return receipt requested, to the mariner or to someone so designated by the mariner in writing. However, it is contrary to the policy of the Commandant to return MMD's to seamen outside of the United States. This policy was initiated to prevent MMD's from falling into unauthorized hands. [NOTE: Mariners may be shipped as replacements at foreign ports without MMD's]. Any request for the return of MMD's to a foreign address shall be denied. Mariners claiming that their MMCs have been lost may apply for duplicates during the suspension period but duplicates shall not be issued until the suspension expires. The suspension period shall not start until duplicate license and/or MMD requests are filed with the appropriate REC. For mariners choosing not to apply for duplicate MMCs, an affidavit shall be required in a form similar to Figure 2-4.
5. Disposition Of MMCs After Revocation. If review indicates that revocation has been ordered but not yet complied with, the IO shall actively pursue this matter. If unsuccessful, the IO shall add the mariner to the Locator List. Revoked MMCs should be held pending any appeal that may be made. If no appeal is made or, if an appeal made is unsuccessful, revoked MMCs shall be voided by permanent means and forward as described in 2.C.7. If the mariner claims that his or her revoked MMCs were previously lost, he or she shall be required to file an affidavit to that effect using the format (or equivalent) in Figure 2-4. The affidavit is to be signed in the presence of an IO or notarized. The original shall be attached to the memorandum/rapid draft (see 2.G.3.), with copies to the ALJ, and the unit file.
6. IO's Post-Hearing Comments. The Commandant's decisions on appeal indicate that a novel case appears very rarely. When this occurs, or when the IO believes that a particular issue or point should be brought to the attention of the Commandant, the IO may submit comments in a letter, via the OCMI and district commander. Many IOs have expressed frustration over the inability to appeal decisions that were adverse to their cases. Although such decisions will not be overturned as a result of the IO's comments, corrective actions to improve the Coast Guard's position in subsequent hearings may be taken, or the ALJ may be apprised of the dynamics involved. [NOTE: The OCMI may direct preparation of the transcript even if no appeal has been indicated, if this will help the IO develop his or her comments.]
7. Newly Discovered Evidence. At any time before a final decision on appeal, or within 1 year of the date of service of the ALJ's decision, a respondent may petition to reopen the hearing on the basis of new evidence in accordance with the regulations. If the decision has not



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- 2.G.7. (cont'd) been appealed to the Commandant by the time the petition is filed, the petition shall be considered by the ALJ. If the decision has been appealed, the petition shall be considered by the Commandant.
8. Claims Under The Equal Access To Justice Act. Procedures for handling applications for awards under the provisions of the Equal Access to Justice Act are contained in 49 CFR Part 6. The "operating administration counsel" may be the IO who appeared at the hearing. If that officer is no longer available, the OCMI in whose zone the hearing was held may designate another officer to act in this capacity. In all cases in which the respondent makes application for fees, the IO or other officer designated as "operating administration counsel" shall file opposing the award, and state why the Coast Guard's position was substantially justified. Such claims shall be coordinated with the district commander (dl) and Commandant (G-LCL).

---

### FIGURE 2-4

#### AFFIDAVIT

1. I, \_\_\_\_\_ hereby notify the U.S. Coast Guard that I have lost the following listed Coast Guard issued License/Merchant Mariner's Document/Certificate of Registry: \_\_\_\_\_.
2. Circumstances concerning the loss, to the best of my knowledge, and my attempts to find the missing MMCs are as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.
3. I further certify that if this, or any other Coast Guard issued license/document are located, it (they) will be promptly surrendered as directed by the order of the Administrative Law Judge \_\_\_\_\_.  
Port

\_\_\_\_\_ dated

\_\_\_\_\_  
Signature

---

#### H. Appeal Process.

1. Notification Of Appeal. A mariner against whom charges have been proved may appeal the decision to the Commandant within 30 days after service of the complete written decision. This is done by filing notice of appeal with the ALJ who heard the case, or with any OCMI for forwarding to that ALJ. The notification of appeal should include a statement as to whether or not the mariner desires a copy of the transcript to prepare the appeal. Transcript costs, determined by 46 CFR 5.701(d), are incurred by the mariner.

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- 2.H.2. Availability Of Records. When the mariner has filed a notice of appeal, the ALJ will direct the preparation of a transcript of the testimony taken in the case (see subparagraph 2.F.2.a above). The transmittal letter forwarding the case to Commandant (G-MAO-1) shall indicate the date the transcript was furnished or mailed to the respondent or the respondent's counsel. [NOTE: The record is not usually transcribed in cases where no appeal has been taken.]
3. Mariner's Actions Prior To Appeal. When a mariner applies for temporary MMCs, the notice of appeal must be filed before any temporary MMCs are issued (see paragraph 2.H.6 and 7 below).
4. Appeal To The NTSB. Provisions in 49 CFR 825 allow appeals to the NTSB of decisions of the Commandant to sustain orders of suspension, revocation, or denial of MMCs. A stay of the suspension or revocation order may be granted when the mariner is otherwise eligible for temporary documents while the mariner appeals his or her case to the NTSB (see 46 CFR 5.715). This permits the mariner to continue service while the appeal is pending (the same as when an appeal to the Commandant is pending).
5. Appeal To The Federal Court. The appellant may further seek relief from an adverse decision in the federal court. When a mariner files suit in federal court seeking to have an adverse decision overturned, the district commander (dl), Commandant (G-MAO-1) and (G-LCL) shall be immediately notified. Generally, mariners are required to exhaust all administrative remedies (that is, appeal to the Commandant and the NTSB) prior to filing such suits. The Coast Guard is bound by the decision of the federal judge in such a case.
6. Issuance Of Temporary MMCs. An original temporary license or document, permitting a mariner to continue service while a decision on the mariner's case is undergoing appeal, may be authorized only by the ALJ hearing the case or by the Commandant. Such a request shall be made in writing, as required by 46 CFR 5.707. A copy of the request shall be forwarded to Commandant (G-MAO-1) for inclusion in the appeal file. An application may be accepted by an OCMI for transmittal to the ALJ who heard the case. If the transcript of the hearing record has been forwarded to the Commandant, or if the request is denied by the ALJ, the request shall be forwarded to Commandant (G-MAO-1). After authorization by the ALJ or the Commandant, temporary MMCs will be issued by a REC. [NOTE: In determining whether to issue temporary MMCs, the ALJ is guided by the provisions of 46 CFR 5.707(c).] The temporary MMCs are valid for a period not to exceed 6 months. Where the appeal process exceeds this period, the mariner may request renewal of any temporary MMCs by filing an application with any OCMI. The OCMI shall contact Commandant (G-MAO-1) for authority to renew the temporary MMCs. When granted, the expired MMCs shall be surrendered and a replacement issued for the period authorized. At the time of renewal, the previously issued MMCs must be surrendered to the REC and forwarded to Commandant (G-MAO-1) for inclusion in the appeal file. A standardized temporary MMD form has been developed for field use (see Figure 2-5). To allow the mariner to post the license in a conspicuous place, as required by 46 U.S.C. 7110, the temporary license is issued on Form CG-2849, License to U.S. Merchant Marine Officer. The face of the license is completed in the same manner as is an original, and is signed and dated by the OCMI or the OCMI's representative, with the following modification to be placed above the signature block:

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- 2.H.6. (cont'd) "Temporary License issued under 46 CFR 5.707, to expire six months from date of issue. This License replaces License Number 123456 issued at (PORT) on (DATE)."

If the final decision on the appeal upholds the original order to suspend or revoke the mariner's MMCs, both must be surrendered immediately. If the original license will expire in less than 6 months, the validity of the temporary license is limited accordingly. If the Commandant authorizes renewal of a temporary license but the original has expired, the licensee shall apply for renewal of the original license before the temporary license is issued (see 46 CFR 10.209). If the suspension or revocation order under appeal is directed against the license only, the appellant need not deposit his or her permanent MMD as well. The IO should coordinate the issuance of temporary MMCs with the REC where the original license was issued.

7. Temporary MMCs Issued During Appeal To The NTSB. Subject to the provisions of 46 CFR 5.715, temporary MMCs may be authorized by the Commandant while a mariner is appealing a decision to the NTSB. Temporary licenses shall be issued as described above, and temporary MMD shall be issued in the format shown on Figure 2-6. The temporary MMCs shall be valid for a maximum of 6 months (or until a decision has been reached). If review has not been completed and an order not served by the NTSB within 6 months, the temporary MMCs may be renewed as described above. At the time of issuance, the previously issued MMCs shall be surrendered to the issuing REC and forwarded to Commandant (G-MAO-1) for inclusion in the appeal file.

### I. Internal Administrative Procedures.

1. Cases Forwarded To Commandant. When a mariner under investigation cannot be located, and evidence gathered indicates that laws or regulations under 46 U.S.C. Chapt. 77 have been violated, the IO should develop the case as fully as possible. The IO shall place the mariner on the Seaman Wanted list in the PACA product set in MSIS. The IO shall hold the case for one year by entering a prompt date of one year from date of entry. If the mariner can not be located during the one year period, the case should then be forwarded to Commandant (G-MAO-1). The case shall include all the evidence collected, i.e., (but is not limited to) Official Logbook entries, abstracts of Shipping Articles, statements of witnesses, and their names, addresses, and telephone numbers. Referral of cases to Commandant (G-MAO-1) should be limited to those cases warranting S&R proceedings. The criteria here are: Would I take this person to a hearing if the person were available? Do I have the evidence necessary to dispose of the case successfully? Except in unusual circumstances, cases should not be forwarded to Headquarters unless the answer to both questions is "yes." If any evidence required to dispose of a serious case is missing, the situation should be fully explained in the PANS product set.
2. Completed Case File. When final personnel action has been completed, the IO shall review the case file and remove unnecessary material, such as notes or reminders, intraoffice notes expressing unsubstantiated opinions, and the like. The requirements of the Freedom of Information Act (FOIA), Privacy Act, and the regulations promulgated thereunder should be considered in reviewing the file. After receipt of a request for release of a file, it is highly improper to remove any part of it (see Volume I of this manual).

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FIGURE 2-5

### STANDARD TEMPORARY MMD

UNITED STATES COAST GUARD TEMPORARY MERCHANT MARINER'S DOCUMENT (MMD)

Office: \_\_\_\_\_, Place: \_\_\_\_\_, Date: \_\_\_\_\_

\_\_\_\_\_, the holder of MMD \_\_\_\_\_, having filed a written request with the Administrative Law Judge (ALJ) at \_\_\_\_\_, on \_\_\_\_\_, 19\_\_\_\_, for the issuance of a Temporary MMD as a substitute for the document which the applicant held prior to the date of an order entered by a Coast Guard ALJ at \_\_\_\_\_, on \_\_\_\_\_, 19\_\_\_\_, the said applicant is hereby granted this Temporary MMD in accordance with Section 5.707 of Title 46 of the Code of Federal Regulations. This Temporary MMD is considered identical in type and character to the applicant's permanent document. This Temporary MMD is issued to be effective for a period of 6 months from the date of issuance hereof, and it will expire on \_\_\_\_\_, 19\_\_\_\_, or upon publication and delivery upon the applicant of the Commandant's decision on the appeal of the holder of this MMD from the above order of the ALJ, whichever occurs first. If this MMD expires before the Commandant's decision is rendered, it may be renewed upon request to any Officer in Charge, Marine Inspection, Coast Guard Marine Safety/Inspection Office.

**WARNING:** Title 18, United States Criminal Code, provides for severe monetary penalties and imprisonment of persons who violate Section 2197 thereof, which deals with the unlawful use of this MMD. Use beyond its expiration date may subject the holder of this document to the penalties of the above statute and, in addition the holder may be subject to a charge of misconduct under the provisions of Chapter 77 of Title 46 of the U.S. Code. Upon expiration of this MMD, it shall be forthwith surrendered to the United States Coast Guard.

#### Identification Merchant Mariner's Document

Merchant Mariner's Document No. \_\_\_\_\_

Issued at: \_\_\_\_\_

On \_\_\_\_\_, 19\_\_\_\_

Endorsed as: \_\_\_\_\_

Born: \_\_\_\_\_

Place: \_\_\_\_\_

Citizenship: \_\_\_\_\_

Social Security No.: \_\_\_\_\_

Address: \_\_\_\_\_

Height: \_\_\_\_\_

Weight: \_\_\_\_\_

Color Hair: \_\_\_\_\_

Color Eyes: \_\_\_\_\_

\_\_\_\_\_  
Signature of Seaman

Issued By: \_\_\_\_\_  
Title

THE ISSUANCE OF THIS MMD DEFERS THE RUNNING OF THE SUSPENSION/REVOCATION PERIOD ORDERED, UNTIL SUCH TIME AS THIS DOCUMENT IS SURRENDERED TO THE U.S. COAST GUARD.

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FIGURE 2-6

### STANDARD TEMPORARY MMD FOR USE DURING APPEAL TO NTSB

#### UNITED STATES COAST GUARD TEMPORARY MERCHANT MARINER'S DOCUMENT (MMD)

Office: \_\_\_\_\_, Place: \_\_\_\_\_, Date: \_\_\_\_\_

\_\_\_\_\_, the holder of MMD \_\_\_\_\_, having filed a written request with the Commandant, U.S. Coast Guard, on \_\_\_\_\_, 19\_\_\_\_, for the issuance of a Temporary MMD as a substitute for the document which the applicant held prior to the date of an order affirmed by the Commandant on \_\_\_\_\_, 19\_\_\_\_, the said applicant is hereby granted this Temporary MMD in accordance with Section 5.715 of Title 46 of the Code of Federal Regulations. This Temporary MMD is considered identical in type and character to the applicant's permanent document. This Temporary MMD is issued to be effective for a period of 6 months from the date of issuance hereof, and it will expire on \_\_\_\_\_, 19\_\_\_\_, or upon publication and delivery upon the applicant of the National Transportation Safety Board's decision on the appeal of the holder of this MMD from the decision of the Commandant, whichever occurs first. If this MMD expires before the National Transportation Safety Board's decision is rendered, it may be renewed upon request to any Officer in Charge, Marine Inspection, Coast Guard Marine Safety/Inspection Office.

WARNING: Title 18, United States Criminal Code, provides for severe monetary penalties and imprisonment of persons who violate Section 2197 thereof, which deals with the unlawful use of documents issued to merchant seamen. The use of this MMD beyond its expiration date may subject the holder of this document to the penalties of the above statute and, in addition the holder may be subject to a charge of misconduct under the provisions of Chapter 77 of Title 46 of the U.S. Code. Upon expiration of this MMD, it shall be forthwith surrendered to the United States Coast Guard.

#### Identification Merchant Mariner's Document

Merchant Mariner's Document No. \_\_\_\_\_

Issued at: \_\_\_\_\_

On \_\_\_\_\_, 19\_\_\_\_

Endorsed as: \_\_\_\_\_

Born: \_\_\_\_\_

Place: \_\_\_\_\_

Citizenship: \_\_\_\_\_

Social Security No.: \_\_\_\_\_

Address: \_\_\_\_\_

Height: \_\_\_\_\_

Weight: \_\_\_\_\_

Color Hair: \_\_\_\_\_

Color Eyes: \_\_\_\_\_

\_\_\_\_\_  
Signature of Seaman

Issued By: \_\_\_\_\_  
Title

THE ISSUANCE OF THIS MMD DEFERS THE RUNNING OF THE SUSPENSION/REVOCATION PERIOD ORDERED, UNTIL SUCH TIME AS THIS DOCUMENT IS SURRENDERED TO THE U.S. COAST GUARD.

- 
3. Commendations Of Mariners. OCMI's may submit letters or other types of reports commending merchant mariners and officers to Headquarters. The Commandant encourages such submittals. All marine safety personnel should recognize cases of outstanding performance of duty by mariners and make suitable reports to Director, National Maritime Center (NMC4A). They may also request information as to the prior record of a mariner for the completion and forwarding of such reports.
  4. Seaman Locator List. The Seaman Locator List has been established to assist in locating merchant mariners wanted for surrender of MMCs which

## MARINE SAFETY MANUAL

- 2.I.4. (cont'd) have been revoked or suspended, or for serving Decisions of ALJs. The list is no longer maintained by Commandant (G-MAO-1). Units are responsible for entering and removing names from the Seaman Locator list in MSIS. Investigation officers should routinely check the Locator/Wanted lists during any personnel investigation. IOs shall contact the port responsible for placing a mariner on the list for details of action required. The following actions will normally be required:
- Service Only. Maintain contact with mariner and request unit to forward the D&O for service.
  - Service And Surrender. Request the D&O. Pending receipt of the D&O, a written notice should be provided the mariner using a form similar to Figure 2-7. Maintain contact with the mariner and encourage him or her to surrender any MMCs held. Notify REC not to issue duplicate, renewal, or upgraded MMCs pending receipt and service of the D&O.
  - Surrender. Verify that the service of the D&O was made. Seek surrender advising mariner that any use or service under revoked or surrendered MMCs is considered to be a violation of 18 U.S.C. 2197 and possibly other statutes as well. If the mariner persists in refusing to surrender, consider referring case to the U.S. attorney after consulting with the district legal officer. If the mariner claims that his or her MMCs are lost, require that an affidavit be filed. See Figure 2-4. Notify RECs not to issue duplicate, renewal, or upgraded MMCs.

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FIGURE 2-7

### SAMPLE NOTICE OF SUSPENSION OR REVOCATION

30 November 1994

Mr. John Butts  
69 Haight Street  
San Francisco, CA 99999

#### NOTICE

By order of the U.S. Coast Guard Administrative Law Judge at San Diego, CA, your Merchant Mariner's Document, Number 123-45-6789, was (revoked (suspended for 60 days)) on 29 January 1994. You are therefore precluded from sailing aboard U.S. Merchant Vessels. The judge's Decision and Order is being sent to this office and will be provided to you upon receipt.

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OCMI

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## MARINE SAFETY MANUAL

- 2.I.5. Seaman Wanted List. The list contains the names of mariners sought in connection with pending personnel investigation. In some cases, the person listed may be sought as a witness, though in nearly all cases the person is a potential respondent. Units are responsible for entering and removing names on the Seaman Wanted List in MSIS when:
- a. The person's testimony is needed to support an otherwise actionable case; or
  - b. Sufficient information is available to support an actionable case against the MMCs.
6. Release of Seaman Locator/Wanted Lists. The Seaman Locator list is re-leasable to the public. The Seaman Wanted list is not re-leasable to the public. Personal information (SSNs, etc.) shall be redacted.
7. Headquarters Assistance. Close liaison between field offices and Commandant (G-MAO-1) is desirable. Officers assigned to Headquarters have the advantage of being exposed to a wide variety of cases and situations. In addition, they will be aware of the latest policy concerning various matters. IOs are encouraged to telephone Commandant (G-MAO-1) when necessary to discuss problems of mutual concern.
8. Training. Each OCMI shall adhere to the guidance provided in the Marine Safety Training and Qualification Program to the fullest extent possible. See Volume I of this manual.
- J. Issuance Of New MMCs After Revocation Or Surrender.

1. Administrative Clemency. Mariners who have voluntarily surrendered their MMCs or had them revoked may apply for new MMCs in accordance with Subpart L of 46 CFR Part 5. Such applications, submitted with supporting documentation, may be accepted by an OCMI when the time limits prescribed by 46 CFR 5.901 have been met and all materials required by 46 CFR 5.903 have been submitted. Additionally, two Applicant Fingerprint Forms (FO258) are required. Procedural guidance is on the back of the form. See also Volume III of this manual. Reason submitted is "Admin. Clemency". Mariners whose prior applications for new MMCs were denied by the Commandant may submit a subsequent application 1 year after the prior submission, or in accordance with the denial letter from G-MAO-1. In such cases, the provisions of 46 CFR 5.903 shall be met, except that supporting evidence of character and employment need cover only the period following the denial of the previous application, unless these areas were identified as contributing to the previous denial. All arrests, periods of confinement or probation subsequent to the revocation or surrender shall be noted in the application. Local background checks are not authorized unless the applicant authorizes the Coast Guard to do so. The time necessary to process a clemency application can be shortened if the fingerprint cards are forwarded to Commandant (G-MOA-1) about six months prior to the applicant completing the entire application package. This allows the initiation of the time-consuming FBI record check and possible retrieval of seamen's records from the Federal Records Center.
2. Review Of Application. The Commandant decides on applications for clemency after review and recommendation by the Administrative Clemency Review Board (ACRB). The Board must conduct an in-depth review of all material submitted with an application for administrative clemency. Consequently, applications should normally be processed by an

## MARINE SAFETY MANUAL

2.J.2. (cont'd) investigating or licensing/documents officer. The Board's recommendation on whether new MMCs should be issued will be based upon whether the applicant can provide satisfactory proof that the bases for the revocation or surrender no longer exists. Information concerning past service as a merchant mariner is contained in records at Headquarters; therefore, the field reviewer need not examine this aspect in detail. Rather, the reviewer's attention should be directed toward such things as the applicant's shoreside employment, attitudes, involvement with law enforcement authorities, social habits, and relationships with fellow employees during the period of surrender or revocation. Of particular concern is whether past traits or habits which led to the remedial action against the applicant's MMCs have been overcome or eliminated.

- a. Applicant's Letter. The applicant should include in the letter described in 46 CFR 5.903 any factors not otherwise covered in the application. The applicant should make specific reference to the cause of the surrender or revocation and note how his or her lifestyle has changed (sobriety, a disinclination toward violence, no further drug use, etc.), and whether the applicant is requesting a waiver of the mandatory waiting periods. Any periods of unemployment must be satisfactorily explained in this letter.
- b. Letters From Employers. If the applicant cannot comply with the provisions of 46 CFR 5.903(c)(1), the field reviewer shall ensure that all periods not covered are satisfactorily explained.
- c. Character References. Letters of character reference are often received that extol the virtues of an applicant who has constantly been in trouble with the authorities. **To be of value, character references should acknowledge the applicant's prior problems and speak directly about the applicant's success in overcoming them.** They must be current and be provided by individuals who have had recent contact with the applicant.
- d. Statement Of Fitness For Sea Duty. When revocation was based upon a physical or mental incompetence charge, the applicant must submit (at the applicant's expense) clinical records or a physician's statement attesting to the applicant's present physical or mental capacity for return to sea duty. If revocation was for a narcotic related offense or alcohol abuse, the documentation must include evidence of rehabilitation. Proof of rehabilitation for drug use includes the completion of a drug rehabilitation program, one year of non-association which includes an appropriate number of random, unannounced drug test conducted after completion of the rehabilitation program, and attendance at AA/NA meeting, or having been subject to long-term (two years or more) random testing. If the surrender or revocation was due to a drug conviction and there was no evidence of use involved, an evaluation conducted by a drug abuse center may be substituted for the completion of a rehabilitation program. If a waiver is request all elements described in 46 CFR 5.901(d) or (e) must be satisfactorily addressed. Individuals applying for administrative clemency are not required to obtain the drug free certificate from an MRO. The "SWEENEY" requirements for cure are considered far more stringent than those of the MRO's certificate.



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3. Verification Of Material. All letters submitted in accordance with 46 CFR 5.903 must be verified for authenticity by the field reviewer. A notation on the bottom of each letter will advise the ACRB that the verification was made.
- 2.J.4. Forwarding To Headquarters. Upon reviewing the application, supporting material, and evidence developed, the OCMI shall forward the file, and MSIS case which includes the IO's and OCMI's recommendation, to Commandant (G-MAO-1). The recommendation should clearly appraise the reliability of supporting material and the applicant's degree of rehabilitation.
5. Referral To The Administrative Clemency Review Board (ACRB). Commandant (G-MAO-1) will refer all applications received to the Board, which is convened at Headquarters by the Commandant. The application file must include the mariner's application and supporting documents, the OCMI's recommendation, an up-to-date resume of the applicant's criminal record, if any (including reports of arrest and disposition for violent or moral offenses), and a complete record of past S&R action.
6. Recommendation Of The ACRB. The ACRB members (usually three) review the applicant's file and forward their recommendations to Commandant (G-MAO-1). Applicants are notified by letter, signed by Commandant (G-MAO-1), which either authorizes the issuance of new MMCs as previously held, or identifies those factors which resulted in denial as well as the appropriate action to be taken in the future to enable approval to be considered. A copy of the letter is sent to the OCMI.



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## CHAPTER 2. PERSONNEL INVESTIGATIONS - PROCEDURES AGAINST LICENSES AND DOCUMENTS

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